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AT A TERM OF THE APPELLATE COURT

109 1
Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Jed Giroux,
Appellee,
-vs-

Appeal from Iroquois.

W.D. Fuller, and
Carl H. Yoder,
Appellants.

Carnes, F.J.

In October 1913, appellant, W. D. Fuller, being heavily in debt made a composition agreement with his creditors. At that time Jed Giroux, the appellee, held an unsatisfied judgment against him and his wife, and refused to join in the agreement unless Fuller would secure the part of the judgment debt that would not in that way be paid. Accordingly, at the same time and practically as a part of the same transaction, Fuller procured appellant, Yoder, to sign as surety his, Fuller's, promissory notes to appellee for the sum that they estimated would not be paid under the composition arrangement. These notes were delivered to appellee and he signed the agreement and afterwards entered satisfaction in full of the judgment against Fuller and his wife. Appellee received his agreed percentage under the composition agreement, and some payments were made from time to time on the notes and a renewal, which was also signed by both appellants, leaving a balance due which was sued for before a justice of the peace in this action and tried on appeal before the circuit court without a jury resulting in a judgment for the plaintiff for \$200.87, and this appeal.

It is assigned for error, but not argued, that the judgment is void because it exceeds the jurisdiction of the justice. The excess is of interest accrued while the suit was pending, and therefore the judgment was properly entered in excess of the \$200. limit. (Alley v. McCabe, 147 Ill. 410, 417.) The only other claim of error is that the surety, Yoder, received no consideration for signing the note; that appellee by joining in the composition agreement and entering satisfaction of his judgment against Fuller and wife, which at that time represented his claim, entirely discharged the whole indebtedness and therefore there was no consideration, moving to either him or his surety, to support the notes given. We see no grounds for this view of the case. The consideration of the notes originally given was a part of the indebtedness of Fuller and wife to appellee and that he should sign the composition agreement, which he did. No consideration moved to Yoder personally. His undertaking was that of a surety on a promissory note requiring no consideration except that moving to the principal maker. The law is settled and very well known on that question. It is not claimed or suggested that appellee is estopped by any fraudulent act or concealment in joining in the composition arrangement ~~agreement~~ with an agreement perhaps secret, differing from that of other creditors joining therein; therefore that question, if it is a question, is not presented for our consideration. Finding no error in the record the judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3630



209 I.A. 24

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

New York Life Insurance
Company, a corporation,

-vs-

Appeal from Dec.

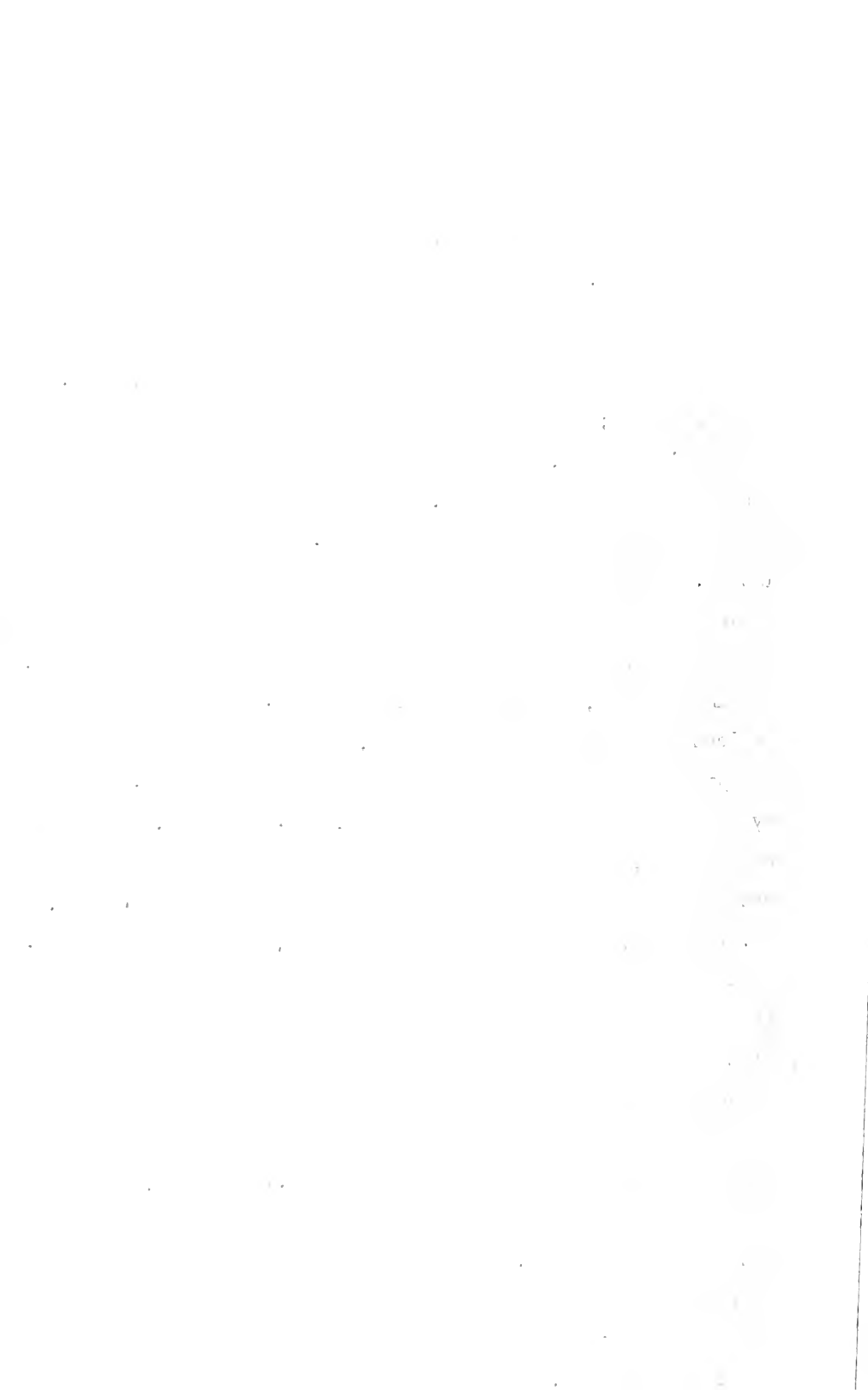
M. Martha Hughes, Appellant,
and Samuel Hughes,
Administrator of the
Estate of Elmer Hughes,
deceased, Appellee.

Carnes, I. J.

This is a contest in chancery on a bill of interpleader between M. Martha Hughes, the appellant, and Samuel Hughes, as administrator of the estate of Elmer Hughes, deceased, the appellee, over the proceeds of a policy issued to deceased in his life time by the New York Life Insurance Company. The company paid the money into court and a decree was entered discharging and releasing it from all liability on the policy. No question arises on this part of the proceeding. The policy as originally written was payable to the executors and assigns of Elmer Hughes. Appellant claims as assignee. There was a written request for change of beneficiary signed by Elmer Hughes, and the only question litigated are whether he was of sound mind and memory or was under undue influence when he signed that paper. These two issues were submitted to a jury and each found in favor of appellant. The chancellor disregarded the jury's finding on the question of undue influence and adopted their finding that Elmer Hughes was of unsound mind at the time he executed the writing, and entered a decree accordingly declaring appellee entitled to receive the

proceeds of the policy, - \$980.51. (There is no controversy about the amount.) Appellee brings the record here for review and urges that the decree is not supported by the evidence.

It appeared that Elmer Hughes died August 10, 1914, of tuberculosis; that he had been at the home of his brother Frank, appellant's husband, about two months before he died; that he had been sick for sometime before, and his physical condition was rapidly weakening during that two months. He had other brothers and sisters. On the evening of the 14th of August (two days before he died) the husband of appellant in the presence of the attending physician produced a blank assignment of the insurance policy, and Elmer Hughes, at his request, signed it. Frank then asked the doctor to witness the signature, which he refused to do because he says he did not regard him competent to do business. The next day appellant got a neighboring woman, Mrs. Beightel, to come over to her house, and they raised Elmer from the bed to a sitting posture and he then signed the assignment offered in evidence, and Mrs. Beightel, at the request of appellant, signed as a witness. She testified on the trial that she thought he was then of sound mind and capable of transacting business, but she had her doubts about it. The doctor testified clearly and positively that he was so far weakened and so near death that he was not capable of acting intelligently in a business transaction. Appellant introduced sixteen witnesses other than Mrs. Beightel, only three of whom professed any knowledge of Elmer Hughes' condition in the last days of his life. It appeared from the testimony of her other thirteen witnesses that in July and at different periods up to a week before he died he had sufficient strength to understand and discuss matters. Of the other three witnesses who testified



that two days before he died he thought he was of sound mind "except as the disease affected him thought he was of sound mind." Another that the day before he died he answered questions in a normal way but with difficulty. He was very quiet on account of his throat, but he considered him of sound mind. The third testified positively that about two days before he died he saw no change in his mental condition; his voice seemed clear and he had no difficulty in speaking. This is all the testimony introduced by appellant. Appellee introduced the doctor before mentioned and six other witnesses, four of whom had seen Elmer about two days before he died. They each testified that he was so weakened in physical and mental condition that he was not competent to transact business. It is objected that these witnesses were unable to testify to anything irrational that he said or did, and said that they were non-expert witnesses and therefore not competent to express an opinion in the absence of such testimony, as held in *Brainard v. Brainard*, 259 Ill. 61, and other cases. It does not appear that this testimony was objected to on the trial for that reason, but appellant says notwithstanding that condition of the record their testimony should not be regarded as of much probative force, again relying upon *Brainard v. Brainard*, supra. To recognize the rule requiring non-experts to state facts on which an opinion of one's sanity might be reasonably based before being allowed to express an opinion. Opinions as to any matter or thing must have more or less weight according to the knowledge and understanding on which they are based. It is true enough that the opinion of a witness concerning one's sanity or inability to do business would be of no weight if it further appeared that he had no knowledge or means

of knowledge of the subject on which he was expressing his opinion; but in the present case the real contention is that Elmer Hughes was so near death that he was unable to think consecutively or reason intelligently, and this was indicated not by any wild incoherent statements on his part, but by his stupid condition. Some of appellee's witnesses made this clear and qualified themselves to express opinions. A reading of the record convinces us that the chancellor reached the right conclusion and even were we inclined to a contrary opinion we could not interfere unless it was clearly apparent the chancellor erred. (Hill v. Fowler, 231 Ill. 205.)

It is argued that the chancellor erred in instructing the jury on the question of undue influence, and said that there was no evidence whatever to sustain that issue; therefore there should have been no instruction. Appellant at the close of the evidence asked for an instructed verdict on both issues, which was properly denied. She did not otherwise ask that the issue of undue influence be withdrawn from the jury, but on the contrary offered an instruction, which was given, that it was the jury's duty to determine from the evidence whether or not at the time of the execution of the paper Elmer Hughes was under any improper influence used to persuade or induce him to sign the same. She is therefore in no position to complain here that the court at the instance of appellee instructed on that issue and she does not complain that the instructions were improper or misleading, if any instructions on that subject were proper; furthermore, we are of the opinion that there was evidence requiring the submission of the issue to the jury.

This disposes of the grounds of error argued; therefore the decree should be affirmed.

Affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this - -
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

1047
3631
209
209 I.A. 26
AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6508.

Agenda No. 23.

Margaret Johnson, admx. Est.,
of Roy B. Johnson, deceased, Appellee,

-vs-

Appeal from Kankakee.

Chicago Surface Lines,
Chicago Interurban Traction
Company, et al,
Appellants.

Carnes, P.J.

Roy B. Johnson, appellee's intestate, a resident of Dixon, Illinois, was on November 25, 1919, visiting his brother-in-law, Fred Coe, in the city of Chicago. On the evening of that day Vernon C. Naugle, an undertaker, owning and driving a Studebaker, seven passenger limousine, with his friend Fred Fried, called at Coe's residence and took him and Johnson out for a drive. Naugle had owned this car several years, operated it himself, and was an experienced driver familiar with the part of the city in which they went. Between nine and ten o'clock in the evening they were driving south on the west side of Vincennes road. Appellant's double track railway was on the east side of that road. The night was dark and rainy. Johnson and Coe sat on the back seat of the auto. At an intersecting street (90th street) Naugle turned his car to cross the tracks. When about fifteen feet from the first rail he looked south and Fried looked north. Each testified that he saw no car approaching and heard no signal. Naugle proceeded to cross the tracks at a speed of from five to eight miles an hour, and when on the farther (north bound) track the auto was struck by a heavy interurban car going north, appellants say at a speed of twenty miles an hour.

Johnson and Coe were killed, the Automobile demolished, and the other two men injured." This action was brought to recover for the death of Johnson. There was a verdict and judgment of \$9500. for the plaintiff. One of the record assignments of error is that the verdict is excessive. There is no suggestion in the brief and argument to that effect; therefore that assignment is abandoned and we need not discuss that feature of the case. A reversal is asked on several other grounds, but most stress is put on the claim that there is no sufficient averment in the declaration and no evidence of due care on the part of Johnson.

The declaration was of three counts, the first alleging that while Johnson was being driven in an easterly direction then and there using due care and caution for his safety, defendants negligently and carelessly ran one of their cars at a high rate of speed, and without any warning or signal of its approach into and against said auto. The second plead a city ordinance requiring such a car when operated at night to be equipped with a bright lighted headlight, and averred that when Roy B. Johnson, who was then and there with due care and caution for his own safety riding in an automobile in an easterly direction upon said 95th street, and was then and there being so driven across the right of way of the defendants on said 95th street, the defendants then and there carelessly and negligently caused and permitted one of their cars to be run and operated without having such headlight lighted thereon, and so, without giving any warning, they then and there carelessly and negligently caused and permitted and allowed said car to run into and against said auto. The third charges that the defendants ran and operated a large interurban car at an excessive

high and dangerous rate of speed along Vincennes road northerly and over said 95th street, and while said Johnson was using due care and caution for his safety riding in an automobile not owned or driven by himself, going in an easterly direction on 95th street and crossing said Vincennes road across said street car tracks of the defendants, defendants carelessly and negligently caused, permitted and allowed one of their said street cars to be driven and operate at a high and dangerous rate of speed on such dark night, and by reason of the premises negligently ran the said street car into and against said automobile.

It is claimed on the authority of *Krieger v. A. E. & C. R. R. Co.*, 242 Ill. 545, 551, and *Bale v. Chicago Junction Ry. Co.*, 259 Ill. 476, 480, that the allegations of the care of deceased are limited to the time he was in the place where he was struck by the car, and that this is especially true of the second count, and therefore that it was error to refer the jury to the declaration in the instructions and inform them that the plaintiff was entitled to recover if she had proven any one count of her declaration. We do not think the counts open to that criticism. The declaration in *Krieger v. A. E. & C. R. R. Co.*, supra, expressly limited the allegation of care to the time when the plaintiff was riding across the said railway. In *Bale v. Chicago Junction Ry. Co.*, supra, the allegation of care seems to be limited to the instant when the deceased was struck. ^{The averments} ~~The averments~~ in the present case are of care while deceased was on 95th street, which includes the time before he rode upon the tracks as well as the time while he was there and injured. If deceased, or any of his party, was lacking in care it was after they reached 95th street. If the

care of the driver instead of the passenger were under consideration the inquiry would be not whether he was properly and carefully driving to the intersection of the streets out whether having reached 95th street he carelessly turned to cross the tracks. There is no suggestion or room for suggestion that deceased was negligent in riding in this automobile with that party, or sitting in the car when it was going down Vincennes road. There is no proof or presumption that he was acquainted with the location or might have known that the car would turn to cross the tracks at that place. This view disposes of appellants' claim that there was at least one bad count in the declaration and therefore error in the instructions referring to the declaration. They make the further claim that even if the counts were all good it was error to send the jury to the declaration to determine the issues, and say proper practice requires the instruction to state the issues. There has been some misunderstanding of the law as announced by the supreme court on this general question of referring the jury to the declaration and the propriety of so doing. The Illinois authorities are reviewed in *Krieger v. L. & C. R. P. Co.*, supra. Instructions are constantly offered and given by the trial courts under the old practice of referring to the declaration, and we regard the law well settled that whatever may be said of its propriety it is not reversible error if there is no bad count in the declaration, and there is proof tending to support the allegations in each count.

On the question of evidence of care of deceased it is to be remembered that he was from the country, probably unfamiliar with the streets and location and the guest of the driver Haugle, an undertaker residing in that vicinity, with long experience as a driver and acquaintance with his surroundings. There was

nothing in the situation to prompt a prudent, sensible man to interfere with the operation of the car by its owner, or attempt to control him in crossing intersecting streets or in other places of more or less danger. It was a situation where under the authority of Hess v. Hoyt, 164 Ill. App. 539, and cases there collected and cited, negligence of the driver could not be imputed to the passenger. It still remains true that Johnson was required to conduct himself as other ordinarily prudent men ordinarily do under such circumstances (Schneeweisz v. Illinois Central R.Co., 196 Ill. App. 248), and if he failed to do so, as did the passenger in Flynn v. Chicago City Ry.Co., 250 Ill. 460, the case relied on by appellants, where three men partially intoxicated were in the night time trying out a blind horse's speed on a rough road driving in violation of a city ordinance, in case of an accident occasioned by the negligence of the driver, there was room for inquiry, as held in that case, whether the passenger was acting like an ordinarily prudent man in placing himself in that position. Situations may be suggested where prudent men, passengers in an automobile, would exercise much authority and control over the driver, and might be guilty of negligence if they failed to do so; and there are other situations where the passenger would be acting ^{very} foolishly in attempting to interfere with the driving of the car. One would hardly suppose a sensible man from the country unfamiliar with the streets of a large city in the position of Johnson at the time in question would assume or feel much responsibility for the course of the car. It may be well said that if Johnson had seen the car approaching he should have warned the driver. He probably would have done so. He and his companion on the back seat were both killed; therefore

no living witness knows what either of them then saw or heard; but if the two men on the front seat each looked for approaching cars and failed to see any, it seems to follow that Johnson may have looked and seen none, in which event he would have said nothing; or if he failed to look he neglected no act that would have been of benefit if performed. But appellants claim the car was in sight when the auto turned to cross the tracks and therefore they say Naugle and Fried are not to be believed when they say they did not see it, and Johnson could have seen it had he looked to the south. This may be so if the car was not running faster than twenty miles an hour. There was evidence tending to show it was running much faster than that. There is nothing in the situation that required a jury to disbelieve Naugle and Fried; much less did it warrant the circuit court in assuming that the car was in view when the auto approached the tracks. And even if it was in view we are not inclined to hold that Johnson, under the circumstances, was not measuring up to the standard of ordinary prudence in sitting on the back seat of the closed automobile without discovering and warning the driver of the approaching danger.

While it is argued that the three charges of negligence of the defendants were none of them proved by the preponderance of the evidence, and there is some testimony that the headlight was lighted, that the whistle was sounded seasonably before reaching the crossing, and that the car was not running more than twelve or fourteen miles an hour, still there is sufficient evidence in support of the allegation of defendants' negligence to support the jury's finding. From a reading of the record we are

inclined to the opinion that the car was approaching the crossing without its headlight burning, without sounding the whistle until the instant of the collision, and at a rate of speed exceeding twenty miles an hour. We conclude that the verdict of the jury is well sustained by the evidence in support of the allegations of defendants' negligence as well as of the lack of due care of the deceased; therefore, unless there was substantial prejudicial error in the rulings on the evidence and instructions there is no reason for reversing the judgment.

Appellants claim error in the giving and refusing of instructions. Appellants' tenth given instruction reads as follows:- "If you believe from the evidence that just before and at the time of the collision, the conditions and surroundings were such that a reasonably prudent man person riding in said auto, about to cross the tracks at 95th street, in the exercise of due care, would have stopped and looked and listened to ascertain if a car was approaching before attempting to cross, then under the law if the deceased did not do so, and was killed by reason of not doing so, you should find defendants not guilty."

The jury were thus informed, in substance, that Johnson, though a passenger, should have exercised that degree of care which the law required of the driver. The court refused some other instruction offered by appellants intended to advise the jury what degree of care is required of a passenger in an automobile, and it is argued that he erred in so doing. But after obtaining the above quoted instruction appellants should not be heard to complain that the court refused other instructions, perhaps correctly drafted,

much less helpful to the defendants than was this one given.

By appellants' fifth instruction the jury were correctly informed of the tests, other than the number of witnesses, to be applied in determining the preponderance of evidence in the case. But though this is not a case where one witness testified on any controlling fact in contradiction to the testimony of several other witnesses, and not a case where there was a contrariety of testimony on some material fact, still the plaintiff offered and the court gave the following instruction:

✓ "The Court instructs the jury that the testimony of one credible witness may be entitled to more weight than the testimony of many others, if, as to those other witnesses, you have reason to believe, and do believe from the evidence and all the facts before you, that such other witnesses have knowingly testified untruthfully and are not corroborated by other credible witnesses or by circumstances proved in the case."

It is substantially the instruction discussed and condemned and held reversible error in an opinion by Mr. Justice McAllister in *Keller v. Hansen*, 14 Ill. App. 640. It was there pointed out that the instruction was harmful under the condition of evidence disclosed in that record. That case was cited with approval in *Tri-City Ry. Co., v. Gould*, 217 Ill. 317. There are several later opinions citing those cases and holding the instruction ad. It has always been condemned, but it has not been held of itself sufficient to reverse a case except on a record where it appeared, as in *Keller v. Hansen*, supra, that it might have been harmful.

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We find no other error in giving or refusing instructions. As a while they were more favorable to the defendants than they should have been. No reason appears why the plaintiff should have asked this instruction or supposed it would have been of benefit to her. It was probably found in some form book and copied and hurriedly passed by the court as a stock instruction without observing that it was in a form so long ago and so repeatedly condemned. We have searched the record carefully to see if there is any reason to suppose the instruction affected or might have affected the verdict and can see none. If it be said that Naugle's testimony that he saw and heard no approaching car when fifteen feet from the crossing is contradicted indirectly by the testimony of other witnesses that the car was then approaching and therefore that the instruction may have been aimed at his testimony and led the jury to disregard the testimony of some witness controverting the fact that the car was not in sight, the answer is that there was no such witness supposed to have sworn falsely on an immaterial fact. The most serious and perhaps only valid objection to the instruction is that it informs the jury that a witness may be impeached by false testimony as to an immaterial issue. It was proper to inform them that his testimony might be impeached by his swearing falsely on a material issue. (United Breweries Co., v. O'Donnell, 221, 334, 338), and it was not prejudicial error to leave out the qualifying adjective material if there were no immaterial issues in dispute; furthermore, even if Naugle was testifying falsely and was impeached, and his testimony as to looking south on the track entirely disregarded, we are of the opinion, as before stated, that nevertheless Johnson should be held in the exercise of due care at the time and place in question. We therefore are not inclined to reverse the judg-

ment for that error alone.

Appellants subpoenaed the motorman driving the car at the time of the accident and he did not appear as a witness. The court permitted them to show that he was duly subpoenaed and his witness fees tendered, and that he refused to attend, but properly refused to permit them to show what he said when he refused to attend the trial because in answer to that general question something improper might have developed prejudicial to the plaintiff. But appellants offered to show that the witness said that his mother was dead and was to be buried that afternoon. This offer was excluded- whether technically right or wrong is of little importance. The offer was made in the presence of the jury and probably allayed any curiosity or false notions any of them may have entertained as to the reason of the witness's absence. We do not regard this action of the court as prejudicial error. Finding no reversible error in the record the judgment is affirmed.

.affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this ____ day of _____
in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

32 ✓

209 I.A. 28

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6528.

Page No. 61.

James O'Meara,
Appellee,

-vs-

Appeal from LaSalle.

Crane Company,
Appellant.

Carnes, P. J.

James O'Meara, the appellee, loaned two horses to Miss A.L.Preston, who was conducting a sanitarium for the Crane Company, appellant, as he claims. They were injured through the negligence of employees of the bailee. He sued the Crane Company before a justice of the peace. Summons was returned served on the corporation by leaving a copy with A.L.Preston, superintendent and other officers, naming them, not found in the county. The corporation appeared and defended on the merits and there was a judgment for the plaintiff of \$200.00, from which the defendant appealed to the circuit court. The parties there appeared. There was a judgment and a judgment on a verdict of \$200.00, from which this appeal is prosecuted and a reversal asked on the ground that R.T. Crane, Jr., and not the Crane Company is the party liable. Appellant's counsel in his statement of fact says, outside of the record, that the Crane Company in its business of conducting a sanitarium at the place in question is only the nominal party; that in fact R.T.Crane, Jr., purchased the premises and is individually furnishing funds to conduct the business. The company responded to the summons and did not object to the service on the ground that A.L.Preston, superintendent, was not an officer of the company, but did offer evidence on the trial x that A.L.Preston

was employed by R.T.Crane, Jr., and not by the company. It appeared, however, that appellee had had similar transactions with the company through the same agency shortly before and that it had recognized them and treated them as the business of the company, and there was correspondence between appellee and the company about this matter before suit was brought in which the company recognized it as one in which the corporation was the proper party for appellee to deal with. The question was put to the jury by proper instructions whether the company or R.T.Crane, Jr., was the bailee of the horses, and we conclude the evidence warranted their finding that it was the company.

Appellee asks us to affirm the judgment because there is no proper assignment of error. There is attached to the record a purported assignment of error signed by defendant's attorney. It is a mere statement of points such as is usually found in abstracts of assignments of error. The assignment of error is a pleading in the case and this very likely should be held bad (3 Corpus Juris, page 1349, et seq.); but we affirm the judgment for the reasons above stated; therefore it is unnecessary to decide or discuss that question. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this _____ day of _____ in the year of our Lord one thousand nine hundred and _____

Clerk of the Appellate Court.

3637

209 I.A. 38

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present:--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 1915 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6458.

6.70.5.

Frank Kingsley, administrator, et al.,
Appellant,

-vs-

Appeal from Peoria.

Farmers Lumber & Grain Company,
Appellant.

Pibell, J.

The Farmers Lumber & Grain Company operates a grain elevator at Glasford in Peoria county, a village of 500 to 1000 inhabitants. Twenty feet westerly from the elevator is a low building, occupied as an engine room. An iron shaft extends from the engine room to the elevator to convey power to the machinery in the elevator. It crosses this intervening space of twenty feet at a height of two feet and three inches from the ground and in that space rests upon two supports eight feet apart. On February 5, 1916, Cloyd Kingsley, eight years and three months old, was playing with said shaft and trying to stop it. His overcoat became caught in some way, presumably between the shaft and one of the supports, and he was whirled round and round the shaft. Both of his legs were broken. He received a severe shock and died therefrom the evening of the next day. The administrator of his estate brought this suit against the elevator company for the benefit of the next of kin and, on a jury trial, had a verdict for \$5000. and a judgment thereon, from which the defendant below appeals.

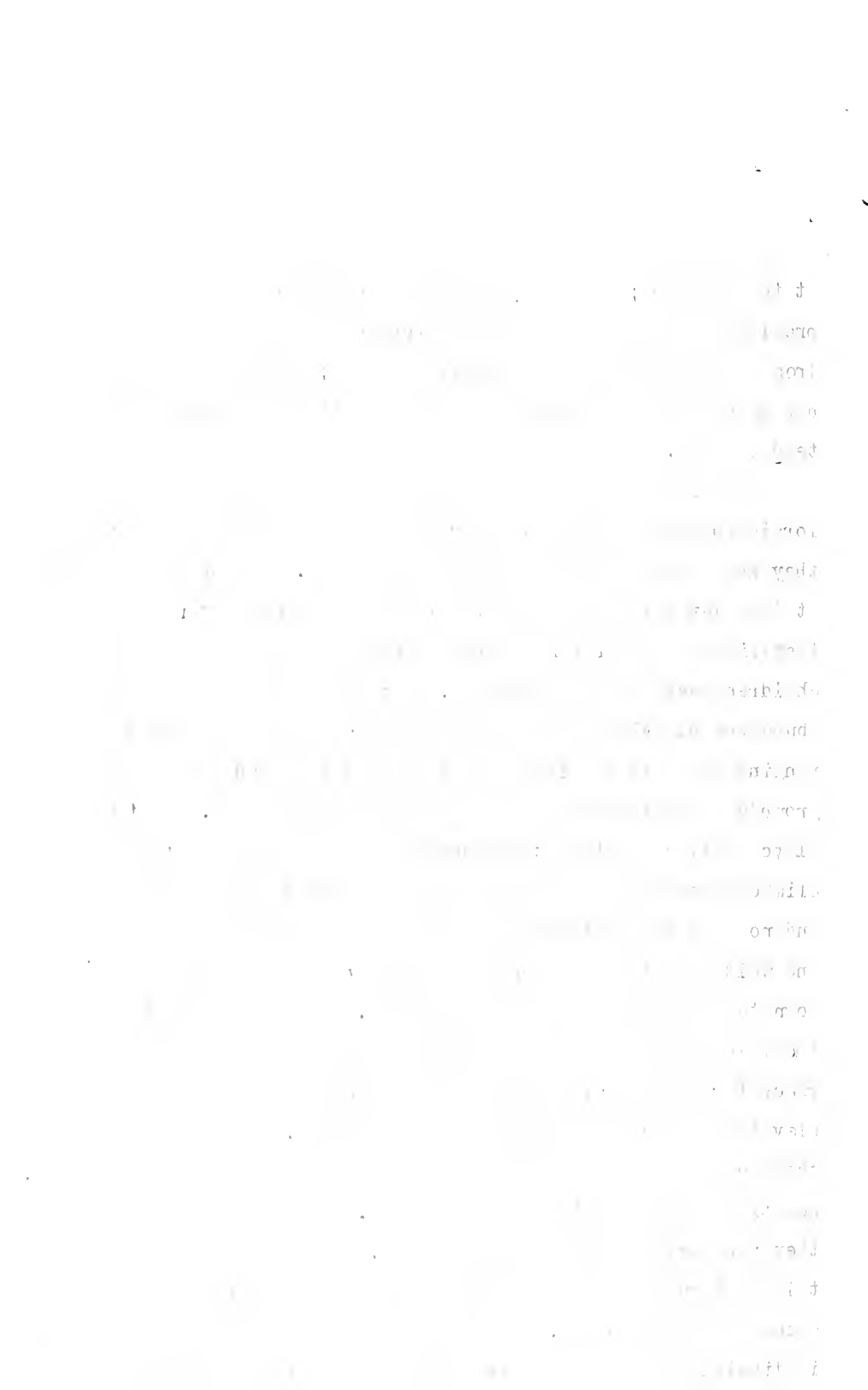
Appellant contends that the declaration is insufficient. Its averments are very full and the supposed defects are extremely

technical. Appellant concedes to the declaration and when that demurrer was overruled it did not abide by it, but pleaded the general issue, thereby admitting that the declaration stated a cause of action. Appellant did not move in arrest of judgment. It cannot now question the sufficiency of the declaration. Wolf v. Powers, 241 Ill. 9.

The buildings of appellant rest upon parts of two blocks of ground. Main street, on the north thereof, runs east and west. Hickory street, on the west thereof, runs north and south. On the west side thereof there are lumber sheds and yards and an office next to Main street. Towards the southerly parts of the blocks three railway tracks pass in an easterly and westerly direction. All the buildings on the blocks^{are} at right angles with the streets, except the elevator, the engine house and a corn crib north of these, all of which are set at right angles to the railway tracks. The lumber sheds come within forty feet of the railway tracks. Teams bringing grain to the elevator pass over the scales on Main street and go south on Hickory street beyond the lumber sheds and then turn easterly towards the elevator, and as they approach it they drive up a runway guarded on each side by an open railing, and drive into the elevator, where the grain is dumped, and then drive easterly down another runway and turn northerly by the office and upon the scales again. The west runway is within six feet of sail shaft in the open space above described. There is only one place on these streets where the shaft can be seen and that is on Main street, so far distant ~~from it~~ that it cannot be told from that place that it is in motion. But its motion, when turning, can be perceived at a distance of fifteen feet and therefore can be seen from the

at the elevator; that all children were forbidden to be upon these premises and deceased was there wrongfully and saw this shaft from a place where he had no right to be; and that the proof does not show that this revolving shaft was attractive to children of tender years.

Appellant had some proof that children were sometimes forbidden to go about this elevator. Some children testified that they knew they were not allowed to go there. A man who had worked at the elevator for appellant for two years before this accident testified that four times during those two years he had ordered children away from the elevator. On the other hand, there is an abundance of evidence introduced by appellee that children of ages ranging from six to fifteen years were very often around these grounds and this elevator and were not ordered away. Often they played ball a short distance north of this shaft. Often they climbed upon the rear of wagons on the street going to this elevator and rode up the west runway and into the elevator and then got off and waited while the grain was dumped and then got on and rode down the east runway and to the scales. Often they went down under the main floor of the elevator in an open space, which they could reach through certain ventilators and also by going inside the elevator and down a certain ladder or stairs. Often they went to the elevator up the west runway to get grain for feed for chickens. Sometimes boys were in the engine room. At most of these times they were not ordered away by anybody. Whenever they went up this west runway, the children were in sight of this shaft and about six feet from it. From this evidence the jury were warranted in finding that appellant might reasonably expect children to be



near this shaft and in sight of it and a child attracted to the shaft from that runway was attracted from a place where it might reasonably be expected to be, within the meaning of *Robertson v. Burke*, supra. Cloyd and a younger brother and another boy about ten years old came directly across the railway from the south and started up the runway, intending to go into the elevator and watch the process of loading a car of grain. They were not ordered off the premises, as appellant contends, but an employee of appellant said to them: "We don't allow boys up there", evidently meaning "in the elevator". They were not told to go off the runway. They started to go west down the runway. Cloyd saw this revolving shaft six feet from him and was attracted to it and went down the runway and back in the space between the engine room and the runway and by the engine room door to the shaft and took hold of the shaft and leaned up against it and said: "Let's try to stop the shaft." The other boys started to the west side of the elevator and then turned back and found Cloyd's body moving around the shaft. This was not the first time that the proof showed a boy about that shaft, for one boy testified that prior to that time he had been both under and over the shaft. We conclude from all this evidence that the jury were warranted in finding that this shaft was attractive to childish instincts and that Cloyd was attracted to it by his childish instincts when he was at a place where children were permitted to be and must have been expected by appellant to be.

Appellant contends that appellee's second instruction is erroneous. We have examined instruction No. 2, as moved in *Burke v. T.P. & W.Ry. Co.*, 263 Ill. 614, as set out in the abstract in that case, and find that it is the same as appellee's instruction No. 2, here objected to, except that the court here added the following:

Page 1

1. General

2. Object

3. Scope

4. Definitions

5. References

6. Abbreviations

7. Symbols

8. Units

9. Figures

10. Tables

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12. Bibliography

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14. Index

15. List of Figures

16. List of Tables

17. List of Abbreviations

18. List of Symbols

19. List of Units

20. List of References

21. List of Figures

22. List of Tables

23. List of Abbreviations

24. List of Symbols

25. List of Units

26. List of References

27. List of Figures

language: "And all the facts and circumstances in evidence should be taken into account as well as the number of the witnesses testifying to a particular fact or state of facts to determine where the preponderance of evidence lies." That language certainly did not invalidate the instruction. Appellant contends that it was error to give appellee's 7th and 8th instructions. It bases this objection upon its claim that there is absolutely no evidence in this record to show that Cloyd was attracted to appellant's premises by the shaft in question. That claim is literally true, for he did not see this shaft before he came upon appellant's premises. But the evidence shows that he was attracted to this shaft from a place on appellant's premises where children were often accustomed to be without objection by appellant, and where, under the proof, appellant was bound to anticipate that they might be at any time. We hold that it was not error to give these instructions. Appellant complains of the refusal of his 4th, 5th, 7th and 8th refused instructions. The 5th undertook to tell the jury that they should not consider certain rulings of the court as containing any intimation that appellant was liable. This refers to the refusal of the court twice to direct a verdict for appellant. It does not appear from the abstract whether the jury were present when those rulings were made or knew that they had been made. It is quite customary in trials, either to have the jury withdraw when such matters are discussed and ruled upon, or for the court and counsel to withdraw to the judge's chambers for that purpose, or to have the motion and ruling made in a low tone at the judge's desk, so that the jury shall not be informed as to what occurred. To make this instruction at all competent it should have been made to appear that the ruling was made in the

presence and hearing of the jury. The 3th refused instruction is not in harmony with the views we have heretofore expressed. The other refused instructions of which complaint is made are sufficiently embodied in instructions given for appellant.

We find no reversible error in the record and the judgment is therefore affirmed.

NICHOLS, J., took no part.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss.

I, CHRISTOPHER C. DUFFY, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and keeper of the Records and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3137 610 ✓ 209 I.A. 52

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

SEP 11 1918

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6498.

The People ex rel Lizzie

Radigk, appellee.

vs

Appeal from Co. Ct. Kankakee.

Oscar Singleman, appellant.

Dibell, J.

This is an appeal by Oscar Singleman from a judgment against him in the county court of Kankakee County in a proceeding under the Bastardy Act, based upon the verdict of a jury finding him to be the father of the illegitimate child of Lizzie Radigk. Appellants only contention here is that the verdict is not justified by the evidence.

The Radigk family lives some three miles north and east of the village of Manteno in Kankakee County. The Singleman family lives three quarters of a mile or a mile nearer Manteno on the same road. There are boys in the Singleman family and boys and girls in the Radigk family, and they have known each other all their lives and have often been back and forth at each other's homes. Lizzie Radigk was paralyzed on one side when she was two years old and has only partial use of that side, and though she attended school through eight grades, her examination as a witness indicates that she is not bright or quick mentally and is not very intelligent, though she might not be called deficient. She testified that defendant is the father of her child. He testified that he had never had intercourse with her and was not the father of her child. In January February and March 1915 her parents discovered that she was pregnant and demanded the name of the father. It was two days before she would name him and she finally complied because of her father's threat to compel her to leave home if she did not reveal it. She then named the defendant. Radigk

went to the Singleman home at once and notified the parents of defendant and shortly thereafter defendant and his parents visited the Radigk home, where Lizzie then declared that the intercourse took place on a certain Sunday in October, when her father and mother had gone to church, leaving Lizzie and her brother, Louis, at home, and defendant came there and proposed to Louis to go with him to a ball game at Peotone, and Louis went to the barn to do the chores there, and during Louis' absence Lizzie said defendant overpowered her and had intercourse with her. At that time she named no other occasion. The child was born on April 3, 1916, and apparently was of ordinary development and therefore could not have been begotten in the previous October. Her parents then demanded an explanation; and she testified that she then remembered that defendant had intercourse with her on the day when her parents went to the funeral of John Koenig, which she thought was in July 1915. After Lizzie was able to get out a warrant was sworn out by her against defendant before a justice of the peace, instituting this proceeding, and she there testified both to the intercourse in October, and also on the day of the Koenig funeral, which her father then testified he thought was in July, although he was not sure. After that trial was ended each side made inquiry and ascertained that the Koenig funeral was on the 8th. day of May 1915, so that the child could not have been begotten at that time. On the trial in the county court Lizzie testified that after learning when the Koenig funeral was, she then thought further and remembered that defendant came to their house and had intercourse with her on a Thursday or a Friday next after Sunday July 4th. when her parents went to Manteno to sell a case of eggs and to buy merchandise. She testified in the county court that defendant had intercourse with her at these three times, and that she

resisted him but was unable to succeed because of her lack of use of her left arm, and that she told no one of it because defendant told her each time that he would kill her if she ever told of it. It is these three stories told by her, which is specially relied upon as making it our duty to reverse the judgment. She has never charged any other person with being the father of the child and she denied ever having had intercourse with any other person than the defendant. The proof showed that early in July, 1915, two persons who claimed to be Mormons stayed over one night at her father's house and slept in a room upstairs. Lizzie slept in another room upstairs. She testified that she went upstairs first and looked the door of her room, and we find nothing in that to authorize the jury to find that this is the child of one of these men. Before the child was born, defendant left home and was away some six weeks or two months, leaving an inference of flight. After that proof was in he offered no evidence as to why he went away or where he went. Each side had some slight corroboration. The father and brother of defendant testified that defendant was planting corn on his father's farm all the day of the Krenig funeral.

This presented a pure question of fact. Only a preponderance of the evidence was required to justify a verdict against defendant. *People v Starr* 50 Ill. 54; *Scharf v People* 134 Ill. 240; *Gehm v People*, 37 Ill. App. 158; *People v Tice* 300 Ill. App. 617. The jury believed Lizzie and they saw both parties on the witness stand and heard them testify, and there may have been that in the manner of the parties on the stand which caused the jury to believe the one and disbelieve the other. The trial judge approved the verdict. In our desire not to do the defendant an injustice, we have carefully read all of

the evidence, not only in the abstract but also in the record. So far as we can see, either story might be true. The children of the two families had always lived near each other and were friendly and generally met several times a week. Defendant undoubtedly had many opportunities, if he had the disposition, and Lizzie was not bright or mentally quick. We do not say that the defendant is the father of the child, but that the evidence is such that a verdict either way, approved by the trial judge, can not be reversed by us. We cannot say that the jury ought to have found the other way, nor that another jury would be likely to find defendant not guilty on the same evidence.

The judgment is therefore affirmed..

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3638

53

AT A TERM OF THE APPELLATE COURT

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 1 1898

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

6499.

10.

Nellie E. Lee, Appellee,

-vs-

Appeal from Kankakee.

Central Business Men's
Association, Appellant.

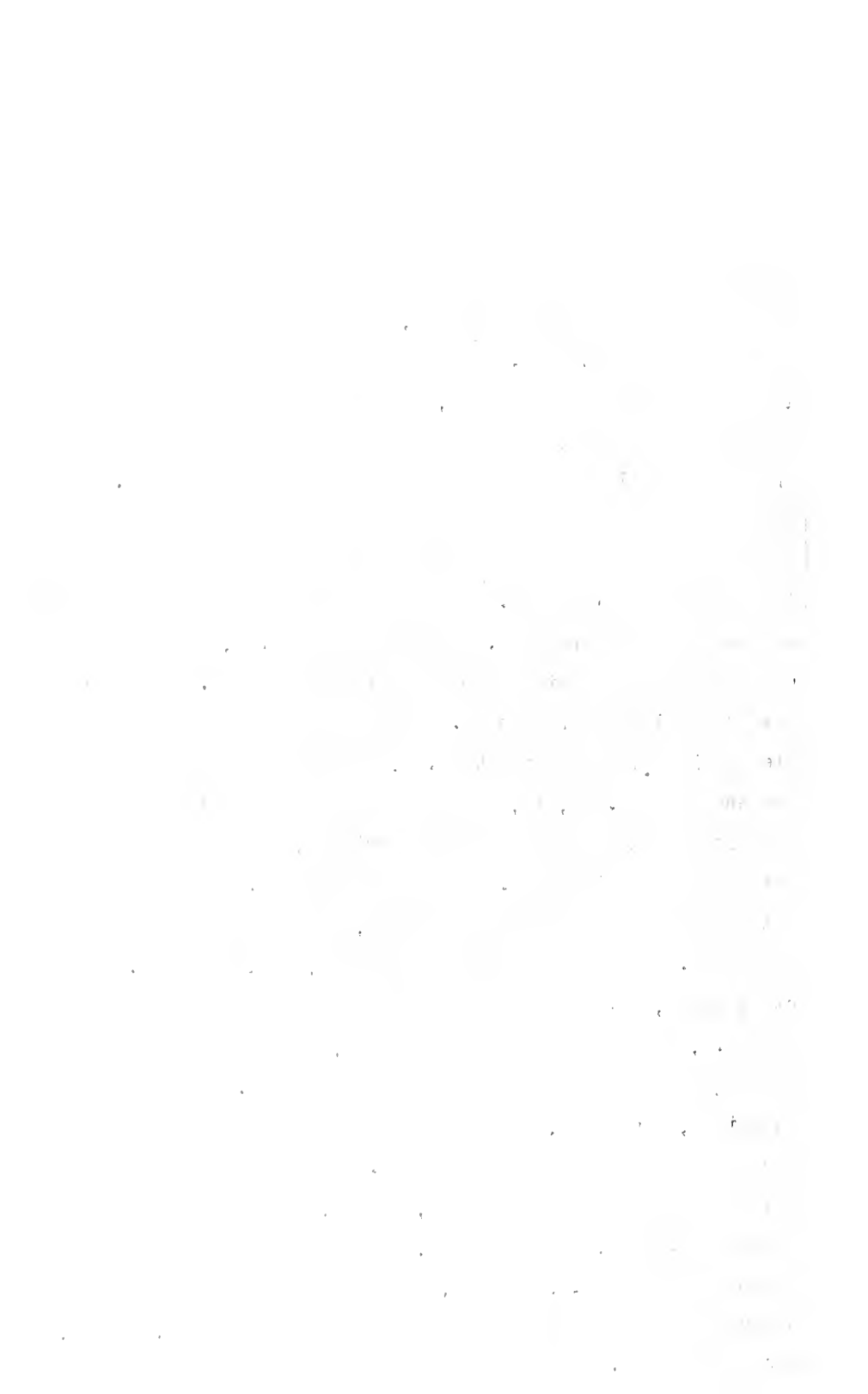
Dibell, J.

Appellee, widow of Mr. George E. Lee of Kankakee, brought this action on a policy of accident insurance wherein she was the beneficiary, issued by appellant to Mr. Lee. It was alleged that he died as the result of an accident while said policy was in force, and that the requisite proofs were furnished, and that she is entitled to recover under said policy. There was a mass of pleading and a jury trial, and a verdict, and a judgment for the amount of policy, from which defendant below appeals.

The main defense is that certain statements made by Mr. Lee in the application for the policy were untrue and that the policy thereby became void. The original declaration set out the policy and also the copy of the application attached to said policy. After a jury trial had been begun, appellee demanded of appellant the original application and it was produced and was found to be different from the copy of the application attached to the policy, and therefore different from the application set out in the declaration. Thereupon by leave of court appellee filed an amended special count wherein the original application and the copy attached to the policy were each set out.

Appellant was ruled to plead to the amended special count and asked and obtained time to do so, and the jury were discharged and the cause continued. [The application was not in the usual form of questions and answers, but in the form of statements bearing consecutive numbers, and after each a place in which to write any qualification of the printed matter by the applicant.

[This application for accident insurance was solicited by the president of appellant and he wrote all the answers appearing in the original application.] The copy attached to the declaration was prepared by appellant. In statement No. 1, after the printed word "except" was written in the original, "No ex." The copy gave the written word "none". The same change was made in the writing after statement No. 9, and after the written part at the ends of Nos. 11, 12, and 13. In the original at the end of statement 16 there was nothing written, but in the copy the word "None" was inserted. After question No. 17, "Do you desire both accident and health insurance?", in the original was written "Acc only." In the copy it was written, "Accident only." In other words, after five statements where the original had the words "No ex.", the copy had the word "None"; and in one place where nothing was written the copy had the word "None." The original contained, therefore, words which might have meant "No exception" and might have meant something else. For instance: It might have been intended to write "No, except," with some matter stated to the scrivener, the president, to be inserted as an exception which was not put in; whereas, as the copy was made out, a word was used which was incapable of more than one meaning; namely, the word "None". In one statement where no writing was con-



tained, the word "None" was inserted. It is a serious question whether it ought not to be held that those changes whereby that which was uncertain and capable of more than one interpretation was changed to a word which is certain, ought not to vitiate the application as a part of the policy, and leave the appellant in the situation of having issued this policy without having an application made a part of the policy. Certainly the practice of making such changes might lead to serious complications. If this case may be treated as if there were no valid application made a part of the policy, or attached to it and referred to therein, then appellee has unquestionably established a cause of action when she introduced the policy, proved the accident and the resulting death, and showed a compliance with the requirements as to proofs of injury or death. That case, if it was so established, has not been defeated by any evidence introduced.

If, however, the original application be treated as the one referred to in the policy, the question then arises whether the statements therein are warranties or representations. We discussed many authorities upon that subject in *Berner v. Brotherhood of American Yeomen*, 154 Ill. App. 27; and in *Raymer v. Modern Brotherhood of America*, 157 Ill. App. 513. *Weisgath vs. Supreme Tribe of Ben Hur*, 272 Ill. 541, has a late consideration of the same subject. Under these authorities, we conclude that these statements made in this application are representations and not warranties. As an illustration of why this is so under certain of the cases commented upon by us in the two appellate court cases above cited, we call attention to the fact that under statement No. 11, if these statements are warranties,

Dr. Leewas granted that he had never had a fit when he was an infant. He could not possibly know that, and it is not to be presumed that he would knowingly consent that everything he paid as premiums upon the policy should be lost and all his rights thereunder terminated, if some old nurse or grandmother should be found who would remember that he had a fit when he was a baby. The only reasonable conclusion in that regard in harmony with the authorities contained in the cases above cited is that that was a representation only and not a warranty. Being representations only, these statements must have been material to affect the case.

[Statements Nos. 8,9,10,11,12, 13 and 14 and the words written after the printed portion of ~~the~~ statements ^{the} in ~~the~~ original application were as follows:-

8. I have no accident or health insurance in this Association; no accident insurance in any company or association; have made no application for accident insurance upon which I have not been notified of the action thereon, except n o e x.
9. No application ever made by me for life, health or accident insurance has been declined; no life, health or accident policy ever issued to me has been canceled nor has any renewal thereof been refused by this or any other company or association, except n o e x .
10. I have never received indemnity from this or any other company or association for accidental injury or illness, except n o t h i n g f o r p a s t f i v e y e a r s .

11. My habits of life are correct and temperate; I am in sound condition mentally and physically; my hearing or vision is not impaired; I have never had nor am I now suffering from or subject to fits, disorders of the brain, or any bodily or mental infirmity, except none.
12. I have not in contemplation any special journey or hazardous undertaking, except none.
13. My average weekly earnings exceed the weekly indemnity payable under this policy and all other accident or health policies carried by me, except none.
14. I have not been disabled nor have I received medical or surgical treatment within the past five years, except.....

It will be observed that the 14th statement as prepared in print by appellant only asked for disability or medical or surgical treatment within the past five years, and also that the written addition, presumably dictated by Dr. Lee, to be added to statement No. 10 confined his statement as to whether he had ever received indemnity from this or any other company or association for accidental injury or illness to the past five years. This entire application except the part written in and the signature of Dr. Lee thereto was prepared and printed by appellant, and is to be construed most strongly against the insurance company, and we think it is a fair inference from the facts just adverted to that the company was seeking information only for the period covered by the five years last preceding the date of the application. We think that is the natural conclusion to which an applicant would come, at least as to all except statement No. 9. So viewing it, there is

nothing in these answers and the evidence, outside of statement No. 9, which tends to establish any defense to this suit, because everything that was sought to be proven, otherwise material, happened much more than five years prior to the date of this application. We therefore conclude that everything except the legal effect of statement No. 9, is immaterial, and even if there were any question as to the pleadings in regard to these other statements, yet it is not claimed that there is anything that would have been a defense. All this is equally applicable to the case if the copy attached to the declaration be treated as the true application.

As to statement No. 9, if the inference already drawn that the other statements were intended by appellant to apply to a period within five years of the date of the application extends also to No. 9, then that disposes of the defense predicated upon said No. 9. As to that statement, this further may be suggested. Mr. Lee did not seek this insurance with appellant. The president of appellant went to Mr. Lee's office and solicited him to make the application for accident insurance. There was nothing discreditable to Mr. Lee in the cancellation in March, 1902, of his accident policy in the Traveler's Insurance Company. The facts seem to have been known to several men in Manikake. There was no reason why he should misstate the facts. There was no motive for him to deceive and no presumption that he intended to do so. The more material inquiries having been limited to five years, it is a reasonable explanation of what was done that Mr. Lee supposed this also to be so limited. If, however, the case be treated as if that statement was not intended to be limited to five years, nevertheless, it seems to us to be immaterial as applied to this

policy. Appellant issued both accident and health policies, and these statements were prepared to be executed by applicants to cover both the information which appellant would need in cases of health insurance, and also in cases of mere accident insurance. If this had been an application for health insurance it would have been material for appellant to know whether any application by Dr. Lee for such insurance had been declined, or any life or health policy issued to him had been canceled or renewal thereof refused by any association at any time, because the length of time that an applicant will be likely to live and the question whether he is liable to be afflicted by disease will depend largely upon his past history; and if he has previously been examined for life or health insurance and had been found to have the seeds of disease within his system, or to have been previously afflicted by disease and physical disorders, or has been rejected because of concealed conditions or physical disability, in former time, and has had such insurance canceled by companies that had discovered that he was not a fit subject for such insurance, all such information would be material for a company to know to which he had applied for health insurance. But accident insurance relates only to the future. That he has had an accident at some past time and that some other company after such accident had canceled an accident policy issued to him has no tendency to show that he will be subject to an accident in the future. It will be observed that in statement No. 10, the applicant caused his answer to the question whether he had ever received indemnity from any association for accidental injury or illness to be limited to the past five years, which was a plain intimation that he had received indemnity for accidental injury or illness previous to that time; and appellant

advised of that fact in that way, did not see fit to make any further inquiries upon that subject. If it had resulted from his receiving such indemnity that such other company chose to cancel its insurance after paying such indemnity, which is the precise defense sought to be interposed here, we do not see how that fact could be material. We are therefore of opinion that the answer to No. 9 is immaterial as applied to an application for accident insurance.

It follows that in our opinion no defense was interposed except that which arose under the plea of the general issue, and a case was made for plaintiff in our opinion, so far as that plea is concerned. Besides some eight or ten pleas that do not appear in this record, there are at least twenty-three pleas in the record and many demurrers and many replications and various rejoinders, and motions and orders striking pleadings from the files, or ~~affir-~~
~~refus-~~
~~ing~~ so to do. We deem it unnecessary to burden this opinion with a discussion of the various rulings of the court on these pleadings, because we have reached the conclusion that under this application defendant had no defense, and that if any errors were committed in the rulings of the pleadings they were immaterial or were cured.

We find no reversible error in the record. The judgment is therefore affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3670 ✓
AT A TERM OF THE APPELLATE COURT,

209 I.A. 69

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6507.

Alice Stevenson, appellee.

vs

Appeal from Co. Ct. Will.

Knights of Pythias, etc.

appellant

Dibell, J.

The title of this cause indicates that it was a suit in the county court of Will County, brought by Mrs. Alice Stevenson against the Knights of Pythias of North America, South America, Europe, Asia, Africa, and Australia, Jurisdiction of Illinois, and that the defendant is the appellant. The abstract does not show what the pleadings were, except that the amended plea was non assumpsit. It gives no further hint of the cause of action declared upon. It says there was a verdict but does not say for whom nor in what amount. It says there were motions for a new trial and in arrest of judgment, but does not show who made those motions. It says there was a judgment but does not state for whom nor against whom, nor in what amount. It says there was a prayer for an appeal, but does not say by whom, nor to what court the appeal was prayed, nor whether the appeal was granted or denied. It shows that there is a bond in the record, but does not say for what purpose. It does not show that any bill of exceptions was asked or granted or signed and filed. Some evidence is set out in the abstract, but it does not show that it is preserved by a bill of exceptions, nor, if so, where that bill begins or ends. Appellee has filed an additional abstract, but it does not supply any of this omitted information. It only gives a fuller statement of certain items of proof. Appellee had a right to file an additional abstract to present more fully any part of the record which she wished to have known to the court, but was under no duty to make it

complete. Rule 16 of this court, 137 Ill. App. 635, requires appellant to file an abstract sufficient to present the case, and practically to convey to us all the information which is omitted from this abstract. This abstract is a gross omission to comply with this important rule. In order to consider and discuss this case we must read this record throughout. It is a familiar rule that a court of review may search the record to find reasons for affirming but is not required to do so in order to find reasons for reversing. Abstracts are required because several judges cannot examine the one record at the same time, and because many matters can properly be abbreviated or condensed, and so that the judges may be relieved of searching a long record to find particular matters desired. We must either abandon Rule 16 or affirm the supposed judgment for want of a sufficient abstract. Appellant's brief states that this is a judgment against it for \$300, upon a certificate issued by it for the benefit of appellee upon the life of her son, now deceased. If there is such a judgment upon such a certificate, the abstract does not show that it is erroneous.

The judgment is therefore affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this —
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3641

209 I.A. 71

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6513.

Cat Tail Drainage Dist. appellant.

vs

Appeal from County Court

Johnson Creek Levee & Drainage

Whiteside.

District.

appellee.

Dibell, J.

In this proceeding in the county court of Whiteside County, brought by the Cat Tail Drainage District against the Johnson Creek Levee & Drainage District under sections 6 to 9 of the Act of 1893 concerning adjoining drainage districts, after demurrers had been sustained to an answer and to certain pleas, the defendant appealed to the supreme court, and that court, in dismissing the appeal, stated the pleadings to that time sufficiently to make it unnecessary to state them here. Cat Tail Drainage District v Johnson Creek Levee & Drainage District, 375 Ill. 191. After the case returned to the county court, defendant filed a plea of non assumpait, with notice of matter of set off, and recoupment, and there was a jury trial and plaintiff had a verdict and a judgment for \$500 and plaintiff appeals from that judgment in its favor.

Appellant contends that the court erred in permitting witnesses to testify to the benefits which Appellant had received from appellee's work, without the witnesses having shown requisite expert knowledge. Spear v Drainage Comm. 113 Ill. 632, examines that question at some length and holds that special knowledge or training is not necessary in such a case to qualify a witness to testify. On a similar question in Peyton v Village of Morgan Park, 172 Ill. 102, it was held that the witnesses showed sufficient knowledge to permit them to express an opinion, and that the weight of that opinion

was for the jury. Chicago City Railway Co. v Bundy, 310 Ill 39, is to the like effect as to the testimony of nonexpert witnesses. Appellant contends that the court erred in permitting the witness Neighbor to answer certain questions put by appellee. We have examined these rulings, and do not find that any serious error was committed. It is contended that the court erred in refusing to admit a water shed map offered by appellant. Perhaps it would have been convenient for use in the trial, but the only avowed purpose of offering it was to show the acreage of the land in the respective districts and this was shown by other proof. We think the reasons stated by the trial judge warranted its exclusion. Before the trial ended there were other maps in evidence sufficient for the purposes of the trial. The main question litigated could not be determined by maps. It is argued that the court erred in refusing to admit a profile offered by appellant. We are of opinion that no reversible error was committed in its rejection. The facts stated on this map and this profile, which were material to the case, were established by oral testimony. The district of appellee was on higher lands than that of appellant, and appellee's district was established and much of its work done before the appellant district was organized. Appellee was permitted to prove benefits which resulted to the lands in appellant's district, by work done before the latter was organized. It is contended that benefits accruing to the lands of the petitioning district before it was organized should not have been taken into consideration. We think the language of section 9 of the Act sufficient to permit it. It would seem unreasonable to construe the statute to mean that the lower lands would not have to account for the benefits received from the work of the upper district because the lower district

was organized last. It is contended that the court erroneously admitted evidence of damage to the upper district by the work done in the lower district, and that this statute only intends to allow set off for benefits and not for damages. Among the items in appellee's notice of set off was a claim for damages. But the real controversy was on the question which district has received the most benefit from the work done in the other district. Moreover, as the pleading by the defendant was to be as at common law, we fail to see why it could not recoup ~~xxxxxxx~~ damages appellee's district had sustained from the work done by the appellant district for which it was being required to pay. Complaint is made of instructions 3, 5, and 7, offered by appellee and of a form of verdict given for it. We do not find these instructions erroneous. We therefore conclude that no ruling made during the course of the trial would authorize a disturbance of the verdict.

Appellee's district was organized first and had many ditches and levees and had an outlet directly into the Mississippi River. Appellant's district was organized on lower grounds and it carried off much water. Appellant took possession of quite a strip of land which was in appellee's district. After appellant had spent several thousand dollars in its district, appellee spent over \$14,000 more upon the supposition that it would be benefited by appellant's improvements. There was much evidence by appellant that that money was all wasted and that in a year's time the passageways excavated by appellant filled up with sand and were useless to appellee. There was a mass of testimony. That introduced by appellant tended to sustain its claim that it had greatly benefited the lands of the upper district. The evidence introduced by appellee tended to show that it had not been benefited, but rather injured, by the work

done in the lower district and that its work had been beneficial to the lands of the lower district. The jury found these issues for the appellant, but allowed a very much less sum than appellant sought. The trial judge was much more conversant with the situation than we can be and he approved that finding. We fail to see how we can demonstrate from the evidence that the jury allowed too small a sum.

Appellee has assigned cross errors and has argued them at length, and yet it closes its brief by asserting that the verdict of the jury should not be disturbed. We conclude appellee's meaning to be that it wishes the judgment affirmed, but if it should not be affirmed then it desires to have its cross errors considered. We find no reversible error in the record and the judgment is therefore affirmed.

STATE OF ILLINOIS, } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. }
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3643 ✓
209 1.A. 78

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 20 1918 the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6526

Mary J. Russell Smith,

appellant.

vs

Appeal from Peoria.

City of Peoria, appellee.

Dibell, J.

Appellant sued appellee in an action on the case and filed a declaration containing one count. Appellant therein alleged that in 1896 she owned real estate abutting on Main street in the City of Peoria; that the city in January 1896, passed an ordinance providing for paving Main Street with brick between curb lines and for a special tax on the abutting lots to pay therefor; and that said improvement was made in 1896 and she paid the special taxes assessed against her real estate therefor; that at the time of the adoption of that ordinance, there was in force another ordinance in said city which provided that whenever a franchise was granted to a street railway company to lay out its railroad in any street in said city on which a pavement had been laid at the expense of the property owners, the company to which said privilege was granted should pay to the city for the use of the contiguous property owners a rateable proportion of the cost of the street as the part taken for such street railroad purposes compared to the entire width of the street so paved and paid for; and that said ordinance should be a part of every right hereafter granted by the city council to any person or corporation. It was averred that the said last named ordinance was still in force and has never been repealed; and that notwithstanding said last named provisions, the city council in July, 1914, granted the Peoria Railway Company authority to construct an additional

railway line on Main street, and did not require a compliance with the aforesaid general ordinance, but permitted the Peoria Railway Company to take an additional width of ten and one half feet of the roadway of Main Street on which said pavement then existed and which had been laid wholly at the expense of appellees and other owners of property abutting on Main street, upon condition that the said Company should pay into the treasury of the city a sum computed at the rate of seventy two and one half cents per square yard for such additional space, which was to be distributed by the city to the rightful claimants thereof; that said Peoria Railway Company in 1914 under said ordinance, constructed such additional track and took the width of ten and one half feet of said paved roadway and continues to occupy it, and did not pay into the city treasury the cost of said improvement on said ten and one-half feet of space, nor has it since paid the same; that the appellees did not require said railway company to pay said amount into the city treasury nor has appellees paid appellant the cost of said improvement; that the sum required to be paid by the said last named ordinance does not represent twenty five per cent of the cost of the improvement of said additional ten and one-half feet, and by said action appellees wrongfully derived appellant of her rights in the premises. To that declaration a general demurrer was sustained. Appellant elected to abide by her declaration and final judgment was entered against her and she prosecutes this appeal. Under the principles laid down in the city of Danville v Danville Water Co. 178 Ill. 299; Freeport Water Co. v City of Freeport, 186 Ill. 179; Normal School v City of Charleston, 271 Ill. 602, and other like cases, we are of opinion that the city council had no power to bind the city by a contract of that kind and to deprive succeeding councils of the power to repeal the ordinance

either expressly or by implication, or to depart from its terms. Moreover the pavement in question was laid in 1896 and the later grant was in 1914, eighteen years afterwards. The court judicially knows that such pavements do not last forever but wear out, and that it would be an unreasonable construction to hold that the ordinance meant that after the pavement had been used many years and was nearly worn out, the city council would be required to enforce from any street railway company desiring ^{to} any of that space payment for the original cost of the pavement many years before. It seems that this city council exacted nearly twenty five per cent of the original cost and we cannot know that that was not a reasonable construction of the ordinance in view of the many years of wear which this pavement had endured, and to construe this ordinance to mean that at this late day it must collect for the benefit of the property owners the original cost of the pavement as put down, would be to make the ordinance so unreasonable as to be void. We are of opinion that the court properly sustained the demurrer. The judgment is therefore affirmed.

Niehau, J. took no part.

STATE OF ILLINOIS, { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
SECOND DISTRICT. Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3645 ✓



209 I.A. 95.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 2 1919

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6531.

Fred L. Stevens, appellant.

vs

Appeal City Ct. Aurora.

Leon Baltazor, appellee.

Dibell, J.

In the trial of this action at law in the court below, there was a verdict for defendant and a judgment that defendant recover his costs of plaintiff and have execution therefor. This is an appeal from that judgment. That is not a final judgment and is not appealable, and is not a bar to a future action by the same plaintiff against the same defendant for the same cause of action. The reasons and authorities for this rule are very fully stated by us in *Town of Magnolia vs Kays*, 200 Ill. App. 123.

The appeal is therefore dismissed with leave to appellant to withdraw his record, abstracts and briefs, and to appellee to withdraw his briefs.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

6514 ✓

3676



209 I.A. 96

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

FEB 12 1917

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6534

Warren S. Lee, appellee

vs

Appeal from Kane.

William D. Boyd, et al

appellees.

Mike Kennedy, appellant.

Dibell, J.

On October 19, 1912, Warren S. Lee filed a bill in equity to remove clouds from the title to a farm of 169.67 acres in Blackberry Township, Kane County, Illinois, which farm he alleged he owned and possessed. Among the defendants were John Barickman and Mike Kennedy, and one of the clouds of which removal was sought was a contract for a deed from George L. Sharp to Lee and Barickman, which had been filed for record and in which it was supposed Kennedy claimed some interest. Barickman and Kennedy answered. Other defendants were defaulted. There was a hearing and a decree removing the clouds, including said contract. Kennedy alone appeals.

This farm was formerly owned by George L. Sharp, and under date of September 8, 1911, he and his wife contracted to sell and convey said premises to Lee and Barickman for \$19,500 of which \$1,000 was to be cash upon the title being approved or perfected by J. C. Murphy, an attorney, and by him found to be merchantable, and \$18,500 secured by a mortgage, payments of \$1,000 to be made each year, except the last which would be \$1,500. The interest was not to begin till March 1, 1912, and possession was to be given at that time. Barickman was then in the employ of a real estate dealer in Minnesota, and was engaged in selling lands in several states. In December following he went to Canada, and Lee claims that he then abandoned this contract. On January 4, 1912, some one filed this contract

for record. Probably it was Barickman who caused it to be recorded. Lee and Sharp met at the office of Murphy early in March, 1912, and by a warranty deed, dated March 1, acknowledged March 23, and filed for record March 29, 1912, Sharp and wife conveyed the farm to Lee. By an instrument dated June 10, 1912, and perhaps executed and delivered at that time, and perhaps not executed and delivered till November following, Barickman assigned this contract to Kennedy, and by quit claim deed, dated November 1, 1912, and acknowledged December 3, 1912, Barickman conveyed these premises to Kennedy. This assignment and this quit claim deed were never recorded. The question is whether, under the proofs, the interest of Barickman in this land has been extinguished. If it has, the decree is correct. If not, the decree is erroneous. Lee contends that Barickman ~~was~~ abandoned the contract when he went to Canada, and seeks to show this by proof of Barickman's declarations and conduct. Barickman denies the declarations alleged, and Kennedy, the only appellant here, contends that Barickman's rights could not be so extinguished.

It is held in *Lasher v Loeffler*, 190 Ill. 150, that rescission or abandonment of a contract to buy or sell real estate may be deduced from circumstances or from a course of conduct clearly evincing an abandonment thereof. To the same effect is *Yocke v Marion*, 269 Ill. 342. The same rule is applied in *Young v Jordan*, 183 Ill. 459; *Curry v Allen*, 176 Ill. 162; *Williams v Vanderbilt* 145 Ill. 238; *Hale v Bryant*, 109 Ill. 34; and other cases. *Campbell v Powers*, 139 Ill. 128, and *Dintleman v Gilbert*, 140 Ill. 597, resemble this case in principle. We hold therefore that abandonment of this contract by Barickman could be shown by his conduct and by the circumstances.

Lee was a farmer living in the general locality of this farm. Barickman was a real estate dealer. It is obvious from the evidence that Barickman did not enter into this contract with any intention of occupying the land. He hoped to make a speedy sale at an advanced price and thus get some profit without investing any money. He ordered a survey of the land, and did not pay for that service, and Lee had to pay it. Lee was given possession of the land early in the fall, and a barn and a silo were erected. Barickman paid none of the expenses Lee paid it all, amounting to \$510. Barickman claims to have worked on this barn a few days, but does not tell what he did and, as he was not a carpenter, his services were probably slight. He took prospective purchasers to the land in automobiles. Sometimes he took Lee's automobile, for which it is not claimed he paid anything. He claims that he frequently hired an automobile for that purpose, and thinks he must have spent \$200 or \$300 therefor, but he produced no bills, and did not name any prospective purchasers whom he carried nor any owners from whom he hired machines, and he did not tell Lee what he had expended. The farm was placed in the hands of two real estate dealers to sell, and before Barickman went to Canada he constantly urged them to exertions to sell. There is testimony tending to show that he had little means, and that he could not pay for the land unless he first sold it. In December he got an offer to enter the employment of a man in Canada, and he accepted it and went to Canada. He had to procure a man to sign a note with him for \$50. to get the money with which to go there. Three witnesses testified of declarations by Barickman to the effect that, unless the land could be sold before he went to Canada, he should abandon the contract and could not perform it. He never afterwards conferred with Lee or the two real estate agents about the land or the sale or

purchase. He never wrote to Murphy to find out what his report was on the title. He never wrote to Sharp, the seller, concerning the contract. Lee paid the \$1,000 in March, and gave his notes for the rest of the purchase money. Barickman paid none of that money and signed none of the notes, and made no inquiries about it. About two years later he was in Kane County and met Lee, but he said nothing to him about this contract or this farm. This case was tried at the November Term 1915, and Barickman testified at that hearing that he had not learned till a few weeks before that that the land had been deeded to Lee. Barickman denied the conversations testified to by the three witnesses. The chancellor saw the witnesses, and evidently believed those who testified against Barickman. Barickman did not deny the proof introduced by Lee of Barickman's conduct in entirely disregarding the contract after he went to Canada. We do not doubt that the court correctly determined that Barickman did abandon this contract. At some later date he met Kennedy in Canada, and from all of Barickman's testimony it was probably after this suit was begun that he delivered to Kennedy the assignment and the quit claim deed. Barickman testified that that was only to enable Kennedy to handle the matter for him, and that he Barickman still retained the real ownership of whatever rights he had under the contract, but that Kennedy was to try to sell it and get \$600 for him. His change of testimony on that subject on redirect examination was of doubtful credibility.

Neither Barickman nor Kennedy ever offered to pay any part of the purchase price of this land. They did not offer to repay to Lee anything he paid upon the improvements or any part of the cash of the first payment, or to pay anything thereafter. That failure to make such an offer is also an insuperable barrier to their maintaining this contract as enforceable in their

favor.

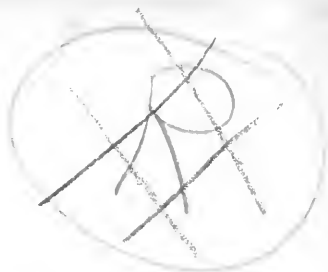
We are of opinion the decree is clearly right upon the record and it is therefore affirmed.

STATE OF ILLINOIS, {
SECOND DISTRICT. { ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3648



209 I.A. 101

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

leg

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6449.

Attilio Catani, appellee.

vs

Appeal from Bureau.

Illinois Third Vein Coal Co.

appellant.

Niehause, J.

Attilio Catani, appellee, brought this suit in the circuit court of Bureau County against the Illinois Third Vein Coal Co., appellant, to recover damages for injuries which he suffered while employed in appellant's mine. There was a trial by jury, which resulted in a verdict for appellee, fixing damages at the sum of \$14,000.00 for which judgment was rendered and from this judgment the Coal Co. appeals.

The alleged basis for recovery, is the violation of the provisions of paragraph 6 of section 20 of chapter 93 of the act concerning Mines and Mining, which provides that the Mine Manager shall provide the miners with a sufficient number of props, caps and timbers, when demanded, delivered on the miners cars at the usual place, in suitable lengths and dimensions for the securing of the roof for the miners. The appellant at the time of the injury, was operating a coal mine at Ladi in Bureau County under the long wall system. Under this system, the coal is mined by utilizing the natural pressure from above to break down the coal. The miners work in rooms at the face of the coal; the rooms in this mine, were about forty two feet wide. The appellee worked in room 45, first left entry, in the third branch of the mine. There is a track in the center of this room, upon which mule cars were operated by drivers, to carry out the coal from the place where it is mined; and these cars were also used to bring in the necessary props. Props were needed to hold up the roof, which was liable to break down from the same pressure that was utilized to break

down the coal. The props were placed on both sides of a room at needed intervals; and as close to the face of the coal as practicable. When coal is mined, the miner uses supports called sprags, which are wedged against the face of the coal to help hold it up, until the miner can remove the mining dirt underneath; then the sprags are removed; and the pressure from above is usually sufficient to break the coal down; after the coal is broken down, it is loaded on cars and hauled out to the ~~xxx~~ shaft of the mine. The evidence tends to show, that in the room where the appellee was working, two lengths of props were needed, $4\frac{1}{2}$ ft. props on one side, and some 6 ft. props on the other, or right hand side.

In his testimony the appellee says; "The day before I got hurt immediately after I went to work, I loaded my car; and when the driver came up, I asked for 6 ft. props. I loaded the first car. ***** He came into my room about half past eight to pull out a car which was loaded. At that time I asked for some 6ft. props because I needed them in my place on the right side; I had just one 6 ft. prop at that time; I had lots of $4\frac{1}{2}$ ft. props; I had no cap ~~to~~ pieces, but had to make them by taking props and sawing them; I had a saw in my room; after the driver took out the car of coal, I loaded two more. The driver brought back the empties. He came back into my room again that morning and I asked again for 6 ft. props. The day before I got hurt, I left the mine at twelve o'clock because I did not have the 6 ft. props. * * * * * Before I left my room that day I set the 6 ft. prop, that I had in the place and took three, four or five of the $4\frac{1}{2}$ ft. props and found pieces of other props and set them under the props, so that they would reach the top. I placed them on the right side near the face of coal. I put pieces of props, that were cut off, under them. I cut off these pieces of props. I went and cut

short pieces of props, and laid them on the ground, and in putting the props I had to put a cap piece to reach the roof. * * * * * I cut cap pieces off of another prop. * * * * * I went back to work there the next morning about seven o'clock. When I got to my room the first thing I did was I got my pick and went over and tested the rock, and it was in good condition. After I started mining between the props, ~~xxxxxxsxxxxxxx~~ and in about fifteen minutes I heard something, and the props that were near me went over, the cap pieces that were under the props. I throwed myself back but couln't save myself. I laid under the coal and the props. * * * * * When I heard something, I meant the props flew away from these rocks, and when I saw the props fall down I tried to watch myself, where I was the squeeze came. * * * * * When the squeeze came and the props fell, I raised up from the position I was in, to get away, but the coal and rock fell on me. * * * * * At the time I had sprags up against the coal."

The testimony of the appellee is corroborated with reference to the conditions of the mine and the necessity of having 6 ft. props; but there is also other evidence in the case which is conflict with it; we think however, that the jury were fully warranted, in believing from the proof made in the case, that the appellee needed the 6 ft. props; that he had demanded them of the driver; and that they were not delivered to him; and that the make shift props which the appellee had to use as a substitute, after he had failed to obtain props of the proper length, were not strong enough nor sufficient to hold up the roof properly near the face of the coal where the appellee was mining; and that consequently, the pressure broke down the props, thereby resulting in the premature breaking down of the coal at the point where the appellee was working, as well as parts of the roof; and he was thereby injured.

The principal ground urged for a reversal of the judgment in this case is, that the demand for props which was made by the appellee was not directly made by the mine manager; as, it is claimed, is contemplated by the Statute.

Appellants counsel ~~strenuously~~ strenuously argues on this appeal that the evidence does not show a custom in the mine to order 6 ft. props from the drivers. The proof in the record however clearly shows, that such a custom prevailed in appellant's mine. All the coal miners, who were witnesses, which included the appellee, testified that such was the custom. The appellee testified, that he had been working in appellant's mine as a coal miner for about six years; and that during all the time he had worked there, he had ordered whatever props that he needed, from the drivers; Ed Jacobossi testified, that he worked in appellants mine as a coal miner for about four years; and that whenever he had needed props, he had ordered the props he needed, from the drivers. Sylvia Mattiolli testified, that he had worked in appellante mine, about four years, and during all this time he had ordered the props he needed from the drivers; and only when the drivers had failed to bring them, had he gone to the mine manager about them. Ferdinand Bentowgli testified, that he had worked in appellant's mine as a coal miner for about three years, and that the props he had needed during that time, he had always ordered from the drivers.

It is true that the appellant sought to prove by its mine manager, and some other witnesses, who were connected with the mine in other capacities than as coal miners, that the custom of ordering props needed by the miners from the drivers of coal cars did not pertain to 6 ft. props. But no reasonable explanation is apparent from the evidence why any exception from the general custom of ordering props needed, from drivers, should be made concerning props, which were 6 ft. in length, instead of 4½

ft. It is evident that the jury concluded that no such exception really existed. And it is but reasonable to assume, from the state of the record on that question, that the jury reached the same conclusion concerning the custom of ordering the props needed from the drivers, which the record discloses appellant's counsel reached, at the end of the following dialogue, which occurred during the progress of the trial.

"Mr. O'Connor: May the record show, that it was customary to order props from the driver?"

"Mr. Chapman: Wait until tomorrow, maybe we will admit that; I have no doubt that it is so."

The jury were fully justified in reaching the conclusion which they did, that the custom contended for by the appellee prevailed in appellant's mine; and that this custom had been in vogue for years. Under these circumstances appellants must be considered as having had knowledge of the custom and acquiesced in it. Campbell v C. R. I. & P. Ry. Co. 149 Ill. App. 130; Coburn v M. E. M. & W. Ry. Co. 149 Ill. App. 133; Kenny v Marquette C. Mfg. Co. 164 Ill. App. 173; Bertleson v Rock Island Plow Co. 164 Ill. App. 159; Muentner v Moline Plow Co. 182 Ill. App. 178; Muentner v Moline Plow Co. 193 Ill. App. 261.

Appellant also complains of the admission of incompetent evidence on the part of the appellee; and the exclusion of proper evidence offered by the appellant at the trial. The record however, does not disclose that any reversible error was committed in that regard; nor do we find, any error in the instructions given by the court for appellee. The instructions given for appellant were numerous, and fully covered all the points of law applicable to its theory of the case, and which it was entitled to have given to the jury; the points presented in the refused instructions, which the appellant was entitled to have given, were all ~~xxxx~~ substantially embraced in the

instructions given in its behalf. We find no reversible error in this phase of the trial. Nor is the amount of the verdict excessive, when considered in the light of the severe and permanent injuries which the appellee, a healthy vigorous man of thirty eight years sustained; and which nearly cost him his life. The pain and suffering he endured; the amputation of his leg, and permanent crippling resulting therefrom; and the consequent inability to perform manual labor, the only kind of labor which he was fitted for, or able to perform.

The judgment is affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this. — — —
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3679



109 I.A. 102

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6474

George Brockhausen,

Defendant in error,

vs

Error to Stephenson.

Stover Gas Machine Manufacturing

Company. Plaintiff in error.

Niehaus, J.

This suit is a controversy between the Stover Gas Machine Manufacturing Company, plaintiff in error, and George W. Brockhausen, Defendant in error, concerning a motor truck which the defendant in error claims to have sold to the plaintiff in error on January 14, 1916, and which the plaintiff in error claims that he purchased on the condition, that it would answer the purposes of his business and prove satisfactory in the handling and moving of heavy steel tanks which were then manufactured by the Stover Company; and that he purchased it with the privilege of trying it out to see whether it would do the work properly; that it did not work satisfactorily, and therefore he finally refused to accept the truck; and the controversy turned upon the question whether there was an unconditional sale as claimed by the defendant in error or a conditional sale as claimed by the Plaintiff in error. There was a trial by jury which resulted in a verdict and judgment for \$675 against the plaintiff in error; and a writ of error is prosecuted from this judgment. The evidence shows, that in October 1915, William A. Held, who conducts and manages the business of the Stover Company, went to the garage of the defendant in error and looked at the truck in question, and ascertained the purchase price thereof, which at that time was fixed at \$675; but no sale was made. Afterwards in January 1916 Edward W. Keene, an employe of the defendant in error, went to the place of business of the Stover

Company to get a job welding order, and while waiting to get his order filled, entered into negotiations with Held for the sale of the truck in question to the Stover Company; upon returning Keene reported to his employer, that Held had offered to purchase the truck for the sum of \$635, and in addition thereto as part of the purchase price, to turn over to the defendant in error an old Dayton truck which the Stover Company then had in use. The defendant in error testified that he accepted Held's offer as reported to him by Keene and sent the truck in question over to the Stover Company; and that thereupon he made out a sale slip, which is a memorandum, showing that he had sold a Ford Truck for the sum of \$675 to the Stover Company also that the company was entitled to a credit of \$50 on the amount of such sale for one Dayton Truck, and thus leaving a net charge against the Stover Company of \$625. He also testified that the making out of the sale slip in question, was the usual way of conducting his business; and that his books were made up from such sale slips. On the trial the sale slip mentioned was offered in evidence by the Defendant in error as substantive evidence to prove his case and was admitted as such evidence over the objection of the plaintiff in error and its admission in evidence is now assigned as error. We are of opinion that the sale slip was not competent evidence to prove the facts it purported to recite. The question raised has been passed upon repeatedly by courts of review in this and other jurisdictions. The generally recognized rule is correctly stated in 17 Cyc. 380, namely that books of account to be received in evidence as such must be the register of business actually done; and that they are inadmissible to prove the terms or contents of a special agreement.

A memorandum relating to the terms of a parcel contract made at the time, by one of the parties negotiating a contract

and read over to the other, without dissent, or made by a third person under circumstances showing an assent thereto by the parties, although not in itself a valid written contract, may be competent as substantive evidence tending to establish, in connection with other evidence, the terms of the contract. But if not made under the direction of both parties or subsequently a proved by them the memorandum is inadmissible. 17 Cyc. 400.

It was held in *Collins v Shaw* 134 Mich. 474 (23 N.W.146) That it was error to permit a party to introduce in evidence an entry in his books of his version of a parole contract. And in *J. Snow Hardware Co. v Loveman*, 131 Ala. 231 (31 S. 19) the court held that an entry of a memorandum of an executory contract for delivery of goods in the future made by a book keeper in accordance with the vendor's instructions, at a time when the vendee was not present, and the book keeper had no personal knowledge of the contract, or of the truthfulness of the memorandum, the entry is not admissible in evidence.

In the case of *Monroe v Snow* 131 Ill. 126, it was contended by the plaintiff that the defendant in the office of the plaintiff directed him to sell certain property for \$90,000 and that as a result of such order and direction the plaintiff, during the conversation, and in the presence and sight of the defendant, opened his sales record book, and wrote therein the date, together with certain cipher marks indicating the new selling price. On the trial the court admitted this entry on the books of the plaintiff in evidence over the objection of the defendant; and it was held that the entry having been made at the time when the direction was given by the defendant, and as a part of the interview, and in the presence and sight of the defendant, that it was a part of the res gestae, and as such was admissible evidence in corroboration of the plaintiff's

testimony.

In the case of *Wiggins v Wilson*, 123 Ill. App. 663 the appellant offered in evidence upon the trial a book of original entries termed a "blotter" which was kept by him in the ordinary course of his business as a banker, wherein appeared entries of several payments made by one Redmon on the note there in controversy, which offer was rejected by the court, it was held if such entries were made in the presence of Thomas Redmon at the time the several transaction occurred, and related to such transactions, they were competent as a part of the res gestae; if not so made they were incompetent.

In the case of *Boyd v Jennings*, 46 Ill. App. 293 the appellant offered in evidence on the trial, a part of a page of a record book kept by him in the regular course of business of property left with him for sale, thereon appeared an entry descriptive of the property there in question, its ownership, price, etc. Which was objected to and excluded. It was there held that the book was properly excluded; that the book was not an account book, the entries in which become admissible in evidence when proven under the provisions of Section 3 Chapter 51 Revised Statutes relating to the admissibility of books of account in evidence.

We think it is clear from the authorities cited, that the sales slip in question considering the circumstances under which it was made, was not competent evidence as part of an account book, admissible under the statute; nor was it competent as memorandum evidence of what it purported to show, namely that an actual, unconditional sale of the truck in question had been made to the plaintiff in error; the sale price of the truck so sold; and the value of the old Dayton truck taken in exchange. The judgment must therefore be reversed and the cause remanded for another trial. Reversed and remanded.



STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

3450



209 I.A. 103

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

mcg

Gen. No. 6485.

John Harms, Almr. appellant.

vs

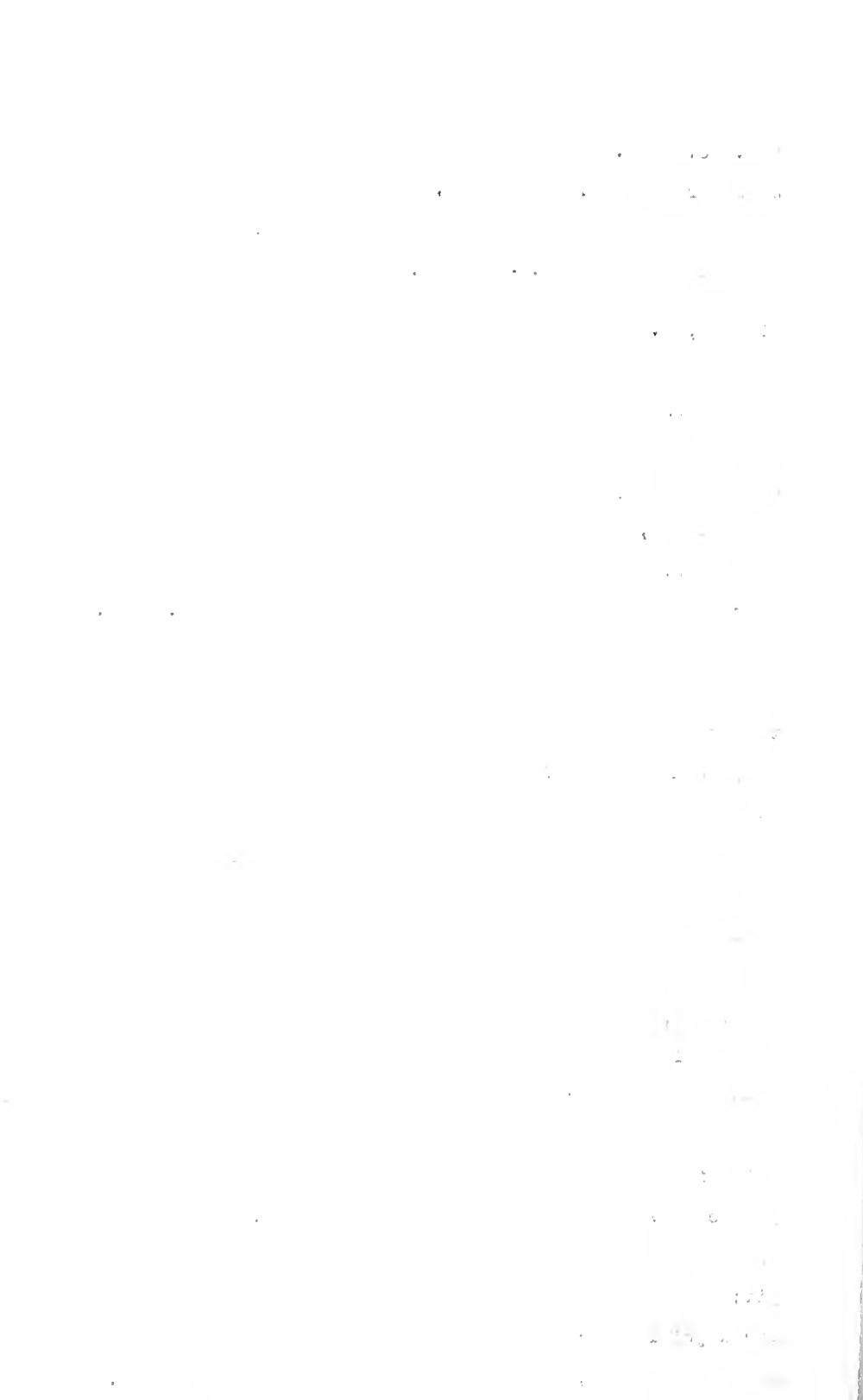
Appeal from Lee.

Lee County Fair Assn. appellee.

Niehaus, J.

The appellant John Harms, as Administrator of the estate of his son Albert Harms, deceased, commenced this suit against the Lee County Fair Association, appellee in the Lee County Circuit Court, to recover damages for the death of his son, whose death, resulted from injuries received in a so called Motorlome, which was one of the attractions at the Lee County Fair held at Amboy in Lee County on September 16th. 1915.

The Motorlome is a structure, circular in form, built upon the ground to a height of about sixteen feet; it is about twenty feet in diameter at the bottom and fifty two feet at the top, gradually sloping from the bottom outwardly and upward at an angle of 70° to a point about three feet from the top where the sides of the structure are perpendicular. The perpendicular sides are called the track; the Motorlome is used to show the highest degree of skill in motor cycle riding; one or more motor cycle riders circle around the sloping sides of the Motorlome, and as the motor cycle gains in momentum gradually run it higher and higher up the sides until the perpendicular track is reached; then it is run around the perpendicular track. At the top of the perpendicular track there is a guard rail, which is a 3 x 8 inch plank bolted down by bolts and which projects over the opening about six inches. The Motorlome in question had two walks at the top around the opening or pit; the one next to the opening being a little lower than the one adjoining it; and next to these walks toward the outer circle of the structure, was the space reserved for spectators.



The plaintiff's son Albert Harms, and his daughter Hulda Harms, visited the Fair; and had come from Whiteside County for that purpose. They went to this Motordome to view the exhibition of motor cycle riding; and after paying the price of admission thereto, went to the top of the structure; they did not go to that part of the structure reserved for spectators, but remained standing on the walk. They stood near the guard rail on the lower walk to witness the performance; and while they were standing there, a motor cycle rider started from the bottom and gradually made his way to the top, and was riding around the perpendicular space called the track, when suddenly the rider was precipitated over the guard rail, plunging forward to where the appellant's intestate was standing, knocking him and others down, and causing the injuries from which the intestate's death finally resulted.

The grounds upon which it is sought to hold the appellee liable are stated in the declaration, which consists of four counts. It is alleged in the first count that it was the duty of the appellee to see that the Motordome in question, was in a reasonably safe condition; in such condition, that the spectators, or persons who paid the proper admission fee to see said exhibition, and who were exercising due care and caution for their own safety, should not be injured; that the appellee neglected its duty in that behalf, and that by reason of some defect in the apparatus, the exact nature of which was unknown to the appellant, one of the motor cycles, and its rider was thrown and hurled against the plaintiff's intestate with great force, and thereby causing the injury to the plaintiff's intestate, from which he died. In the second count it is alleged, that the defendant carelessly, negligently, wrongful improperly and recklessly permitted and allowed the structure of the Motordome, and the machines therein used, to be and remain

in a highly dangerous and unsafe condition for the safety of plaintiff's ~~intestate~~ intestate; and that one of the motor cycles used in said motorlome was in an unsafe, dangerous and defective condition; and that the rider and machine left the track, and were with great force hurled against the plaintiff's intestate because the appellee had allowed and permitted one of said motor cycles to be and remain in such unsafe, dangerous and defective condition. In the third count it is alleged, that it was the duty of the appellee to exercise reasonable care and diligence in the construction, maintenance and operation of said Motorlome and motor cycles used; and that the appellee notwithstanding its said duties carelessly, negligently and wrongfully maintained and operated said motorlome, and one of said motor cycles in an improper and unsafe condition; and failed and neglected to inspect and carefully examine, repair and maintain said motorlome and motor cycles, in a reasonable safe condition for the patrons and spectators in said Motorlome; but permitted and allowed said Motorlome and motor cycles to become impaired, defective and unsafe; and that by reason of the appellee's negligence in not inspecting and repairing said Motorlome and motor cycles and allowing said Motorlome and motor cycles to become defective and unsafe, the plaintiff's intestate was then and there injured. In the fourth count it is alleged that the appellee carelessly negligently, wrongfully, improperly and recklessly, permitted and allowed persons to operate said motor cycles, and said Motorlome which persons were then and there unskillful, incompetent, and not fit to conduct or operate said ~~Motorcycles~~ motor cycles; and that one of the riders of said motor cycles by reason of his incompetency, unskillfulness and unfit ness to conduct said motor cycles, was thrown from said motor cycle and with great force was hurled against plaintiff's intestate

by means of which he received the injuries from which he died. To this declaration and the charges of negligence therein contained the appellee pleaded the general issue. There was a trial by jury, which resulted in a verdict for the appellee; and the Court thereupon entered judgment for costs against the appellant, from which judgment the appellant prosecutes this appeal.

The only point urged on this appeal by the appellant is, that the verdict of the jury is contrary to the law and the evidence. A careful examination of the record fails to disclose evidence in the record tending to prove that the structure of this Motordome was in any way defective, or out of repair; nor is there any proof tending to show that any of the motor cycles which were used were in any way defective, or out of repair. And it is also clear from the evidence that the rider of the motor cycle in question was unusually skillful, and thoroughly competent in the performance of the feat which he undertook to perform. None of the charges of negligence upon which the appellant based his right to recover appear to be sustained by the evidence. The evidence rather tends to show, that the accidental falling of cigar ashes into the pit of the dome, which got into the eyes of the rider of the motor cycle in question, caused him to lose control of himself and of his machine; and that it was in consequence of this that he was hurled from the machine against the deceased, causing the injuries in question.

We are of opinion, that from the evidence, the jury were fully warranted in finding that the injuries and subsequent death of appellant's intestate, were not caused by any negligence of the appellee as charged in the declaration; and the jury therefore properly returned a verdict finding the appellee not guilty. The judgment is affirmed.

Affirmed.

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STATE OF ILLINOIS, {
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this. _____
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

209 I.A. 104

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the second day of October,
in the year of our Lord one thousand nine hundred and seven-
teen, within and for the Second District of the State of
Illinois:

Present--The Hon. DUANE J. CARNES, Presiding Justice.

Hon. DORRANCE DIBELL, Justice.

Hon. JOHN M. NIEHAUS, Justice.

CHRISTOPHER C. DUFFY, Clerk.

E. M. DAVIS, Sheriff.

BE IT REMEMBERED, that afterwards, to-wit: on

Feb. 12, 1915, the opinion of the Court was filed in
the Clerk's office of said Court, in the words and figures
following, to-wit:

Gen. No. 6497

Moorman Manufacturing Co.

appellant.

vs

Appeal City Ct. Kewanee.

Frank Wilson, appellee

Niehhaus, J.

This is a suit commenced by the appellant Moorman Manufacturing Company, to recover \$43 the price of 600 lbs. of Moorman Hog Remedy, purchased by Frank Wilson, the appellee, from an agent of the appellant. The case was first tried before a Justice of the Peace, and resulted in a judgment for appellant for the sum it claimed; an appeal was thereupon taken to the city court of Kewanee, where the case was tried de novo by a jury; and resulted in a verdict in favor of the appellee; and a judgment was then entered by the court in accordance with the verdict of the jury and against the appellant for costs; and it now prosecutes this appeal. The appellant insists that the verdict was manifestly against the weight of the evidence and the law. The appellant testified on the trial, that he purchased the hog remedy in question from appellant's sales agent, upon the representation, that it was a remedy beneficial to hogs, if he fed it to his hogs as he directed; (that it would expel the worms in the hogs; prevent cholera and sickness; and cause the hogs to do better, grade better, and make better weight; and that it would make the grain and corn fed to them, which at that time was worth sixty to sixty five cents a bushel, bring him a dollar a bushel; that the agent gave him the directions as to how he should feed it to his hogs to bring the results mentioned. Appellee testified further, that he fed it to his hogs as directed; but that instead of being beneficial he noticed that within two or three days after feeding it, the hogs began

to hang their heads down, that their hair stood up on end; that they did not scour; and would not eat; and commenced to die; and that over eighty died. That his hogs before he commenced to feed this remedy were healthy and thrifty; and were all active; and that he did not have a sick hog on his place. If the testimony of the appellee is true, it is clear, that the hog remedy in question was not only worthless for the purpose for which it was sold, but resulted in injury to his hogs instead of being beneficial to them. If the hog remedy was worthless appellant has no legal right to recover. 35 Cyc. 370. It was a question of fact whether or not the remedy was fed according to the direction given; and whether or not it had the effect upon the hogs, stated by the appellee. This was a question for the jury. The jury found that the appellee's version of the facts was the true one; and we are of opinion, that the jury was fully warranted in this conclusion, which it reached from the evidence. Under these circumstances this court would not be justified in holding, that the verdict and judgment should be set aside. We find no reversible error in the rulings of the court upon the admissibility of the evidence. The judgment is affirmed.

Affirmed.

STATE OF ILLINOIS, }
SECOND DISTRICT. } ss. I, CHRISTOPHER C. DUFFY, Clerk of the Appellate
Court, in and for said Second District of the State of Illinois, and keeper of the Records
and Seal thereof, DO HEREBY CERTIFY that the foregoing is a true copy of the opinion of the
said Appellate Court in the above entitled cause, of record in my office.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
seal of the said Appellate Court, at Ottawa, this
day of _____ in the year of our Lord one
thousand nine hundred and _____

Clerk of the Appellate Court.

LEOPOLD MIODUSZEWSKI,
Defendant in Error,

vs.

STEFAN SPOGANITZ,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

209 I.A. 112

MR. PRESIDING JUSTICE HOLCOM
DELIVERED THE OPINION OF THE COURT.

This is an action for malicious prosecution in which plaintiff recovered a verdict and judgment against defendant for \$1,000, and this writ of error is sued out to reverse that judgment. On a former trial there was a verdict for the plaintiff with damages assessed at \$125, and on motion of defendant the trial Judge granted a new trial.

The parties to this suit, with others, were interested in a corporation known as the Kensington Co-operative Store. Trouble arose concerning accounts. Plaintiff had been treasurer of the company, and there were some disputes regarding his accounts, and it was contended that plaintiff was guilty of embezzling the funds of the corporation. Defendant made two complaints against plaintiff and two other persons on a charge of conspiracy and also made complaint against plaintiff on a charge of embezzlement. Plaintiff at the preliminary hearing on the charge of conspiracy was discharged. On the charge of embezzlement plaintiff was held to the Grand jury, but that body failed to indict him, and these prosecutions then ended.

The evidence on the part of the defendant proves without contradiction that all of the facts and circumstances within the knowledge of defendant, or which were with diligence accessible to him, on which the prosecutions of plaintiff were



based, were fully and fairly laid before competent counsel for their advice and direction, and that, acting under the advise of such counsel, complaints were made and the prosecutions had. Defendant was advised by such counsel to inaugurate the prosecutions, and in the belief, from the advice of such counsel, that there was reasonable cause to believe that plaintiff was guilty of the accusations brought against him, complaints were made and plaintiff arrested and dealt with in the manner above recited.

Advice of competent counsel made upon a full and fair disclosure of all the facts and circumstances involved in the case in which the advice of such counsel is sought, is a justification for prosecution and protection to the prosecutor against being answerable in damages as for malicious prosecution.

We are of the opinion from an examination of the evidence, that there was probable cause therefrom to believe that plaintiff was guilty of the conspiracy and embezzlement with which he was charged on the complaints of defendant, and that the counsel consulted in the matter might in prudence advise the prosecution of plaintiff therefor. The course pursued by defendant we hold successfully rebuts any presumption of malice and conclusively establishes the fact that defendant did not act without probable cause.

It is the law that where a prosecuting witness presents all the facts within his knowledge, or that he could have ascertained by reasonable diligence, fairly and without reserve, to a lawyer of recognized ability and in good standing, and in good faith acts on such lawyer's advice, he cannot be held responsible in an action for malicious prosecution.

The fact that defendant may have exhibited some temper in discussing the supposed delinquencies of plaintiff is not evidence of malice in the light of the fact that the prosecutions were instituted upon the advice of competent counsel on a full and fair statement of all the facts within the knowledge of the prosecutor or which he could have obtained upon reasonable inquiry. Tuebbecke v. Rothchild, 152 Ill. App. 321; Shea v. Morand, 191 *ibid.* 11.

The termination of the criminal prosecutions in favor of plaintiff, on account of which this action is brought, does not tend to prove either the element of malice or want of probable cause.

The judgment of the Municipal Court is reversed with a finding of fact.

REVERSED WITH FINDING OF FACT.

The court finds as ultimate facts that the defendant acted in the prosecutions complained about under the advice of counsel of recognized ability and in good standing, after first presenting to such counsel all the facts and circumstances regarding the matters involved in the prosecutions within his knowledge or that he could have ascertained by reasonable diligence; that defendant in good faith acted upon the advice of such counsel in the prosecutions counted upon in plaintiff's pleading, that probable cause for the prosecutions was proven, and that defendant in instituting the prosecutions against plaintiff was not moved thereto by malice.

181 - 23524.

PEOPLE OF THE STATE OF
ILLINOIS, by eto., ex
rel. LEWIS E. LARSON,
Appellants,

vs.

ALBERT H. MILLER,
Appellee.

) APPEAL,

) CIRCUIT COURT,

) COOK COUNTY.

209 I.A. 134

MR. PRESIDING JUSTICE HENDON
DELIVERED THE OPINION OF THE COURT.

This case was consolidated for hearing with
No. 23522, People ex rel, eto. v. Davis, et al., in which
we have this day filed an opinion. What is said in that
opinion is equally applicable to the instant case.

The only question which we deem of importance for
our decision not covered by the opinion in the Davis case,
is the question of whether or not the office of secretary
of the board, to which the respondent Miller claims title,
is a civil service office. In the Davis case we have
already decided that the proceedings in which this appoint-
ment was made were void. Sec. 129 of the 1917 act provides
as follows:-

"The Board also may appoint, or provide for the
appointment, of such other officers and employees
as it may deem necessary, pursuant to the provisions
of the Civil Service law, except as otherwise provided
herein. * * * The appointment and removal of the super-
intendent of schools, the business manager and of the
attorney and all assistant attorneys, shall not be
subject to the Civil Service Law. * * * All appoint-
ments of other employees of the Board of Education,
except as herein otherwise provided, shall be made
pursuant to the provisions of the Civil Service
Law. * * *"

It is clear from the foregoing that the secretary
of the board is under civil service law and that no one is

2.

eligible to the office of secretary who has not qualified therefor under that law. It is admitted that the respondent Miller is not within the civil service. Therefore he was not eligible to the secretaryship.

The provisions of the act of 1909 and that of 1917 in relation to secretary of the board are very similar, and it is conceded that under the act of 1909 the office of secretary was under civil service, and that Larson, the relator, was, as secretary of the old board, a civil service man. While under the act of 1917 the board has a right to elect a secretary and prescribe his duties and term of office and compensation, still that action is subject to civil service rules and the office must be filled by a civil service man.

As the respondent Miller was not eligible to the office of secretary of the board under the rules of the civil service, the judgment of the Circuit Court as to him is reversed and the cause is remanded for such further proceedings consistent with the views here expressed, to the end that respondent may be ousted from the office of secretary of the Board of Education, which he unlawfully usurps, as charged in the information.

REVERSED AND REMANDED.

209 I.A. 135

Appellee.

MR. CHIEF JUSTICE HOLDEN
DELIVERED THE OPINION OF THE COURT.

ATTACHED.

190 - 23523.

209 I.A. 136

PEOPLE OF THE STATE OF
ILLINOIS by Macley Hoyne,
State's Attorney, ex rel.
LEWIS E. LARSON,

Appellants,

vs.

PERCY B. COFFIN,

Appellee.

APPEAL,

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Both the relator and respondent claim the office of Business Manager of the Board of Education of the City of Chicago. The Circuit Court held that respondent was the legal occupant of that office to the exclusion of relators' claims thereto.

The questions here involved have been decided in the opinions this day rendered in cases General Numbers 23522 and 23525. To those opinions we refer without repeating for our decision of this appeal, and for the reasons stated in those opinions the judgment of the Circuit Court is affirmed.

AFFIRMED.

THE PROVIDENT LIFE & TRUST
COMPANY OF PHILADELPHIA, a
corporation, J. ROBERTS FOULKE,
as Trustee, and J. BARTON TOWNSEND,
Successor in Trust,

Defendants in Error,

vs.

WYNNEHAN VVYVAN MILN and MALCOLM
MILN, by LOUISE KYLE, their guardian,
et al..

Plaintiffs in Error.

209 I.A. 137

ERROR TO CIRCUIT
COURT OF COOK COUNTY.

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainants, The Provident Life and Trust Company of Philadelphia, a corporation, J. Roberts Foulke, as Trustee, and J. Barton Townsend, Successor in Trust, filed their bill of complaint in which they sought to fore-close a trust deed on certain real estate.

The facts as gathered from the pleadings and evidence submitted on the trial show that on April 24, 1905, The Royal Trust Company was by decree appointed a trustee to administer a trust created by the will of Thomas M. Jordan, who died on the 28th day of September, 1888. The decree of April 24, 1905, among other things decrees and finds -

"that owing to the change in character of the trust estate, it is for the best interest of the beneficiaries therein that the powers of the trustee be 'enlarged,' and that such trustee be empowered to care for and manage said premises and to lease the same, or any part thereof, to take possession of the said premises and to borrow money and secure the same by mortgage or trust deed upon said premises, or upon some part thereof, and to sell said premises, or any part thereof, subject to the approval of this court. And that in the care of the property the trustee ought to be empowered to pay the expense of maintenance, 'and any and all just encumbrances, charges and liens thereon, now existing, hereby created or hereafter to be made thereon by such trustee; that after paying all expenses, charges, encumbrances and liens on the premises as aforesaid, or as may hereafter be ordered by the court, such trustee shall pay any balance derived from said trust property or income from the proceeds of any sale thereof remaining on hand, over

to Louise Jordan Miln during her lifetime, as in said will provided."

On June 1, 1905, the Probate court of Cook County appointed Julia Holmes Smith guardian of the estates of the five minor children of Louise Jordan Miln.

The will of Thomas M. Jordan, deceased, by a judicial decree was construed to vest a life estate in the real estate in question in Louise Jordan Miln with remainder to her five minor children. On July 17, 1905, on petition of the guardian of the said minor children, the Probate court authorized the then trustee to borrow \$17,000 on the security of the real estate in his possession and to distribute such sum as specifically directed in the decree. This loan was not consummated. On November 28, 1906, on petition of the guardian of the minor children, the Superior Court entered a decree which authorized the then trustee, together with the guardian of the minor children and Louise Jordan Miln, the owner of the life estate in the real estate in question, to borrow \$3,250 on the security of such real estate and to distribute a part of this sum in discharge of certain expenses or liens incurred by the decree of April 24, 1905. Following the entry of this decree a trust deed was executed and delivered to secure the payment of the sum of \$3,250.

October 26, 1907, Louise Jordan Miln was appointed trustee of the trust estate, and June 18, 1908, as such trustee she filed a petition in the Superior court in which she prayed for authority to borrow \$15,000 upon the security of the real estate in question, and on the same day the court entered a decree which found that the \$17,000 loan authorized by the decree of July 17, 1905, had not been borrowed; that \$3,250 had been borrowed under the decree above referred to; that the improvements on the real

estate in question were in bad repair, and that it was for the best interest of all concerned that \$15,000 be borrowed, etc. The decree authorized the trustee to borrow this sum as trustee and to secure the payment thereof by the execution of a mortgage or trust deed on the premises in question, and the trustee was also authorized to borrow a further sum of \$2,000 and to secure the same by the execution of a second mortgage on the premises.

This decree provided that the money so borrowed should be distributed as follows:

"(1st) current taxes on the property should be paid; (2d) that the necessary expenses of making the loan, including the payment of a guaranty policy should be paid; (3d) necessary repairs on said property not exceeding \$1,200 should be made; (4th) \$3,000 should be paid over to Julia Holmes Smith, as guardian of said minor defendants for their use and benefit, and that the balance of the moneys received on said loans should be turned over to Louise Miln in lieu of the moneys provided to be paid to her in the order entered by Judge Kavanagh and referred to in said petition."

Following the entry of this decree Louise Jordan Miln, individually and as trustee, under the will of Thomas M. Jordan, deceased, and Julia Holmes Smith as guardian of the estates of the said minor children, executed and delivered notes for a total sum of \$15,000 and also a trust deed to secure their payment. This trust deed is dated June 20, 1908.

On September 5, 1908, the Chicago Title and Trust Company, as agent for the complainant The Provident Life & Trust Company of Philadelphia, distributed the moneys procured on the loan as directed by the decree of June 18, 1908, and in accordance with a letter of instructions from Louise Jordan Miln. Default having been made in the payment of the interest installments due Dec. 20, 1908, the complainant The Provident Life & Trust Company declared the



principal sum due and it and the trustee complainants filed their bill in the Circuit court to foreclose the trust deed. The cause was referred to a master in chancery, who in his report recommended that a decree of foreclosure be entered in favor of complainants. On November 10, 1913, the court overruled exception to the master's report and entered a decree of foreclosure. It is sought by writ of error to reverse this decree.

For the sake of brevity we have omitted reference to certain other proceedings had in the courts of Cook county with reference to the administration of the estate created by the will of Thomas W. Jordan, deceased. While several questions are discussed by counsel, it is our opinion that the case presents but one fundamental question for determination by this court.

It is conceded that the corporation complainant advanced to the trustee for the benefit of the trust estate the sum of \$15,000; that it has not been guilty of any morally wrongful conduct, but it is contended that it has been a party to a transaction which constituted a fraud in law of the rights of the defendants.

The corporation complainant was knowingly dealing with a trustee and it was required to know the scope of her authority so far as it relates to the power to borrow money on the security of the real estate to which she held title as trustee; this specific authority to borrow money on the security of the real estate in question appears in express language in the decree of April 24, 1905, and also in the decree entered on June 18, 1908. All of the parties in interest in the property were made parties in the causes in which the decrees were entered, and the law gave them ample opportunity to correct by appeal, writ of error or otherwise

any error which might have intervened therein. The Provident Life and Trust Company was not a party to the proceedings in which these decrees were entered, and we are inclined to hold that it was not called upon to look behind the express directions to the trustee and the guardian of the minor children as they appeared in the decrees.

In the matter of the distribution of the money borrowed by the trustee under the authority of the decree of June 18, 1908, that decree refers to and directs the distribution of so much of the moneys borrowed under it as remained after payment of four specified items, in accordance with the directions of a decree entered in a cause between the same parties, June 17, 1905, and it is contended that the complainants were charged by law with notice of the alleged illegality of certain provisions of both decrees. We do not think that there is any equitable or legal merit to this contention. The court which entered the decrees in question had full jurisdiction of the parties to and of the subject matter of the litigation. The decree of April 24, 1905, conferred upon the trustee the power to borrow money on the security of the real estate in question; it further preserved to the trustee the privilege of asking the aid and advice of the court from time to time in the administration of the trust estate, and the court expressly retained jurisdiction over the trust estate for that purpose. The court therefore retained jurisdiction to thereafter enter any proper order or decree in the administration of the trust estate. If it can be said that error had intervened in the proceedings which resulted in the decrees in question, such error cannot be availed of by the defendants here; the decrees of June 18, 1908, and July 17, 1905, are not on their face erroneous. The decree of June 18, 1908, is not, so

far as we can determine, improvident, in that it provided means for the payment of certain indebtedness which the parents of the minor children had properly incurred in the support and education of the minors. We may assume in this proceeding that the decree was based upon sufficient facts, but even if this be not so, the rights of a third person who in good faith acted on the authority of such decree ought to be protected in a court of equity. Sielbeck v. Grothman, 248 Ill. 435.

In Burton v. Barry, 146 Ill. 71, the court said:

"There are two kinds of fraud as applied to this subject - fraud in obtaining a decree by false evidence, and fraud which gives a court colorable jurisdiction over the defendant's person. In case of a fraud of the former kind, a decree cannot be impeached in a separate and independent proceeding, though it is otherwise in the case of a fraud of the latter kind."

It is not pretended here that any fraud in law was committed which gave the court which entered the decree, under which the trust deed was executed, colorable jurisdiction. As a matter of fact, we are unable to discover any fraud of any sort in these proceedings which would invalidate a contract made with a person not a party thereto. Counsel for defendants rely upon the Arrowsmith case, 129 U. S. 86. While this case tends to support the contention of counsel, we do not think that it is in harmony with the law of this State as enunciated by the Supreme Court. Hopkins v. Patton, 257 Ill. 346; Hunter v. Stoneburner, 92 Ill. 75. The money obtained from the loan having been distributed in accordance with the directions of the decree of June 18, 1908, and the complainant corporation having in good faith loaned its money for the benefit of the trust estate, the defendants cannot in a collateral proceeding be permitted to question the validity of the transaction.

Other questions are discussed by counsel for

defendant which relate to the power of the guardian of the minor children to reimburse their parents for money paid by them for the support and education of such children. The determination of this question involves also the validity of the decree which authorized the trustee to borrow money for the benefit of the estate and is disposed of by the holding that that decree cannot be attacked collaterally.

The decree of the Circuit Court will be affirmed..

DECREE AFFIRMED.

EMILY KLEINSCHMIDT,
Defendant in Error.

vs.

AUGUST KLEINSCHMIDT,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

209 I.A. 139

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The complainant, Emily Kleinschmidt, filed her bill of complaint in the Circuit Court of Cook County, in which bill she sought a dissolution of her marriage with defendant, August Kleinschmidt, on the ground that he had been guilty of habitual drunkenness for more than two years immediately preceding the filing of the bill. It was also alleged in the bill that the complainant and defendant were tenants in common in certain real estate of a value of about \$5,000; that said real estate was encumbered by mortgage for the sum of \$2,500, and that the income derived therefrom was the sole means of support of the complainant and three minor children.

The complainant prayed in her bill for the sole care and custody of the minor children, but she did not pray for alimony nor that the interest of the defendant, her husband, in the real estate referred to should be decreed to her. The defendant being in default, the case was tried before the court without a jury and a decree was entered in favor of the complainant, a part of which decree is as follows:

"It is further ordered, adjudged and decreed, that the defendant convey to the complainant by good and sufficient deed, in full payment of alimony, all his right, title and interest, in and to the following described real estate: The north 15 feet of lot 36 and

the south 15 feet of Lot 37 in Block 6 in Treat's Sub-division of the northeast quarter of the southwest quarter of Section 2, Township 39 North, Range 13, in the County of Cook and State of Illinois, and that he execute said deed within 30 days from the entry of the decree herein, and it is further provided that in the event that the defendant fails to comply with the order of this court to execute said deed as aforesaid, that then, in that case, the master in chancery of this court, Willis E. Thorne, shall execute a deed to the said premises to the complainant, conveying all right, title, or interest of the defendant in and to the said premises to the complainant."

The defendant brings the case here by writ of error for review.

Counsel for defendant insist that the chancellor who tried the case had no power under the evidence submitted on the trial to award to complainant all of defendant's interest in the real estate which was owned by complainant and defendant as tenants in common, and further, that the evidence heard on the trial was not sufficient to support any decree for alimony in favor of the plaintiff. No objection is made here to that part of the decree granting a divorce to complainant and awarding to her the custody of minor children. The only question raised is as to that part of the decree which awards the defendant's interest in the real estate in question to the complainant.

The decision of the case presented to us involves the disposition of a freehold. Section 25 of chapter 37 of Revised Statutes of Illinois provides that appellate courts in this State shall exercise appellate jurisdiction in all matters of appeal or writs of error from final judgments, orders or decrees of trial courts "other than criminal cases, not misdemeanors, and cases involving a franchise or freehold or the validity of a statute."

In the recent case of Mechling v. Meyers, et al., (not reported) the Supreme Court held on motion that this court had no jurisdiction to entertain an appeal from a decree of a trial court entered in proceedings to partition certain real estate.

The only question involved in the instant case is as to the power of the trial court by decree in divorce proceedings to dispossess the defendant of the possession and ownership of his interest in the real estate in question. The determination of this question necessarily requires this court to pass upon a freehold interest in real estate, and this case will, under Section 102, Chapter 110 of the Revised Statutes, be transferred to the Supreme Court.

CASE TRANSFERRED TO THE SUPREME COURT.

MARGARET A. HOLLER,
Plaintiff in Error,

vs.

CHICAGO CITY RAILWAY COMPANY,
Defendant in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

209 I.A. 140

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff, Margaret A. Holler, brought suit in the Superior Court against Chicago City Railway Company. In her declaration she alleged that she was a passenger on a west bound street car which was operated by certain servants of the defendant on 35th street in Chicago; that while she was attempting to alight from the car at Gage street it was negligently started by defendant's servants and she was thereby thrown to the ground and injured. The verdict of the jury and judgment of the court were in favor of the defendant, and the plaintiff by prosecution of this writ of error seeks to reverse this judgment.

It is insisted for the plaintiff that the trial court erred in its rulings on the admissibility of certain evidence and in reading certain instructions to the jury; it is also contended that the verdict of the jury is against the weight of the evidence. The chief matter of fact in issue between the parties is as to whether plaintiff attempted to alight from the street car before or after it had come to a full stop at or near the intersection of Gage street and 35th street.

The testimony of three witnesses introduced on behalf of the plaintiff, one of whom was the plaintiff herself, tended to prove that the plaintiff did not attempt to leave the rear platform of the car until it had come to a full stop. The testimony of a like number of witnesses

for the defendant, including the conductor on the car, was substantially to the effect that the plaintiff was injured by reason of an attempt on her part to leave the car while it was in motion. Substantially all of the witnesses, however, who testified in the case, directly or by necessary inference say that the accident occurred before the car upon which the plaintiff was riding had reached the far or west side of Gage street, the usual stopping place for west-bound street cars at the time the accident occurred. While certain of the witnesses assert that the car in fact stopped on the east side of Gage street, we think the jury were warranted in believing, as they evidently did, that the car did not stop on that side of the street. No reason was shown why the car should have stopped east of Gage street. The evidence does not indicate that passing vehicles or other obstacles interfered with the passage of the car to the west side of Gage street, its usual stopping place.

A witness for the plaintiff testified that, before the car had reached Gage street plaintiff got out of her seat and rushed to the rear platform. A witness named Brown, testifying for the plaintiff, said that he saw the entire transaction, and that when the ^{car} came to a stop, after the plaintiff was thrown, the rear end of the car was about two-thirds across Gage street, and that plaintiff was lying "about even with the east line of Gage street." A Mrs. Corcoran, who testified for the plaintiff, said that she, the witness, was walking on the south side of 35th street, a short distance east of Gage street, when the car was going west on the north side of 35th street; that when the car stopped at Gage street its rear end was "about 10 feet in on Gage;" that at that point the car started up again and again stopped; that before it stopped the second time "it ran pretty near half

way across Gage street; that "the lady was lying pretty near beside the stepper where you step off." While there appears to have been some confusion in the mind of this witness as to just where the car stopped, it is clear from her testimony that the plaintiff fell from the car at some point east of the usual stopping place. Again on cross-examination this witness stated that she saw the plaintiff after the accident lying "about even with the east line of Gage street."

We think it clear from the testimony of these and other witnesses in the case that the accident occurred east of the usual stopping place on the west side of Gage street, and that on the whole record the evidence clearly preponderates in favor of the theory of the defendant that plaintiff sustained her injuries by attempting to alight from the street car before it had come to a full stop. >

Instructions Nos. 1, 2, 3, and 5, were given to the jury at the request of the defendant. Instruction No. 1 told the jury that the burden rested upon the plaintiff of proving, by a preponderance of the evidence, that the accident was caused by reason of the alleged negligence of the defendant in starting the street car while plaintiff was attempting to alight therefrom, and that if plaintiff had failed in proving this allegation of her declaration that the car was so started by defendant, no recovery could be had against the defendant.

Instruction No. 2 informed the jury that if the plaintiff attempted to get off the car before it reached a regular stopping place at 35th street and Gage street, and while it was slowing down and in motion, she could not recover against the defendant.

Instruction No. 3 informed the jury that if the plaintiff did not fall from the car while in the act of alighting therefrom when it was stopped and standing still, but "while it was in motion," then plaintiff could not recover.

Instruction No. 5 told the jury that a street car company was not an insurer of the absolute safety of passengers, and that it was not the duty of the company to protect its passengers against the consequences of remote, unusual or unexpected conduct on their part which could not be foreseen, etc., by the exercise of the highest degree of care consistent with the practical operation of the company's business, etc. This correct statement of the law is followed in the instruction by a direction to the jury that if the jury believed that the car in question had not come to a stop at the time of the accident in question, and that the plaintiff stepped therefrom while it was in motion, and that such conduct on her part was unusual and could not be foreseen, etc., then the failure of the defendant to prevent the accident could not be held to be negligence on its part.

This practice freely indulged by trial courts in giving instructions such as are here complained of has been frequently criticised by courts of review. The instructions repeatedly call the attention of the jury to the fact that if the plaintiff had attempted to alight from a car while it was in motion, or while it was slowing down, she could not recover against the defendant. It was the duty of the court to plainly inform the jury that this fact was a material issue in the case and to tell the jury that if plaintiff had failed by proper proof to establish her case with reference thereto, then she could not recover, but the court was not authorized for this reason to reiterate

a warning that plaintiff could not recover if she had not sustained the burden which the law cast upon her with reference to her conduct at and just before the time of the occurrence of the accident. In these instructions the jury were told in varying forms that if the plaintiff alighted from the car while it was in motion she could not recover.

In Hickey v. C. C. Ry. Co., 148 Ill. App. 218,

it is said:

"The jurors must have understood and taken for granted that the court meant something when so instructing them repeatedly. Emphasis by frequent repetition, even of a particular, properly given proposition, is objectionable."

(Thiele v. Hetzel, 184 Ill. App. 633.)

We do not regard this case as close upon its facts. On the merits of the case the verdict of the jury appears to have been correct, and while it was error, as indicated, to repeat and emphasize in several instructions the position of one of the parties to the suit with reference to a material issue, the error was not so serious as to cause a reversal of the judgment.

It is also insisted that the court erred in permitting oral proof of the substance of a statement made by a witness a few days after the accident occurred in support of testimony given by him on his direct examination. While we think there is much force in the contention of counsel for plaintiff with reference to this question, we are of the opinion that the admission of this evidence was not such error as would materially affect the verdict of the jury.

Where, upon an examination of all the evidence admitted in a case, it appears that the verdict of

the jury is just, a judgment founded thereon will not be disturbed because of error occurring in the trial where the record affirmatively shows that the error was not prejudicial and did not affect the merits of the cause. The verdict of the jury in the case at bar appears to have been the only one possible under the evidence.

JUDGMENT AFFIRMED.

PEOPLE OF THE STATE OF ILLINOIS
ex rel. GEORGE J. WILLIAMS,

Appellant,

vs.

CITY OF CHICAGO et al.,
Appellees.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

209 I.A. 142

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

A petition for a writ of mandamus was filed in the Circuit Court of Cook County, George J. Williams, relator, against the respondents, in which petition the relator sought to compel respondents to remove ashes from his 27 apartment building without cost or expense to relator, except as he had contributed to the general funds of the City of Chicago, out of which was appropriated on March 16, 1916, a sum for the removal of ashes, garbage, etc., from "residential property."

A general demurrer was filed by respondents to the petition as amended. The trial court sustained the demurrer and dismissed the petition, and the petitioner brings the case here by appeal for review.

Sections 992, 995, 996, 997, 998 and 1000 of the Municipal Code of the City of Chicago are general ordinances which relate to the care and removal of ashes and garbage from private property in the City of Chicago.

In the brief filed by counsel for petitioner it is stated -

crel
"In the judgment of relator the material point in this case is a construction of the proviso to Section 1000 in connection with Section 995 of the code. He claims that his property falls within Section 995 and that he is relieved from removing his own ashes by force of the proviso to Section 1000 and that respondents are legally bound to remove his ashes precisely as they are removing ashes from other residential property."

Sections 995 and 1000 of the Municipal Code of Chicago are as follows:

"995. Vessels for Garbage, Ashes, etc.) It shall be the duty of every owner or his agent or occupant of any house, building, flat, apartment or tenement in the city of Chicago where persons reside, board or lodge, or where animal or vegetable food is prepared or served, and which is a private residence, to provide for such house, building, flat, apartment or tenement, and at all times to maintain in good order and repair a separate vessel or vessels for garbage, and a separate vessel or vessels for ashes and miscellaneous waste, of the material, construction and capacity prescribed in section 996 of this article, and in number proportioned as follows:

"For every house or building other than flat, apartment or tenement building one vessel for garbage and one vessel for ashes and miscellaneous waste.

"For every flat, apartment or tenement building, one of each such vessels for each floor, flat, apartment or story of such building; and if such floor, flat, apartment or story is occupied by more than five persons, then one of each such vessels for each additional five occupants.

* * * * *

"1000. Disposition of Ashes.) It shall be the duty of every person, firm or corporation occupying, operating or controlling any building or portion thereof, in the City of Chicago, which is heated by steam, hot air or hot water, or in or about which combustibles are used or ashes produced, to keep in or about such building all ashes, cinders, and other waste arising from combustion and produced therein, and to remove or cause to be removed the same from the said premises at his, her or its own expense, at such times and in such manner as the commissioner of public works may direct; and not to use in connection with said building or portion thereof any vessel for ashes and miscellaneous waste provided for domestic use.

"Provided this section shall not apply to any case where a vessel or vessels for ashes are required by the provisions of section 995 of this article, nor apply to any building containing less than five flats."

Section 995 above set out provides that the owner or controller of any building where persons reside, board or lodge, etc., shall provide for the occupants of such building separate vessels for the reception of garbage and for ashes and miscellaneous waste, etc., and for the manner and the place where such vessels are to be maintained and kept.

Section 1000 above set out does not require the Commissioner of Public Works to remove ashes from buildings. It does, however, require the owners of buildings heated by steam, hot air or hot water to remove all ashes produced in such buildings.

Section 995 deals with all buildings used for residential purposes. Section 1000 refers specifically to buildings heated by steam, hot air or hot water. Section 995 deals with the question of keeping and depositing ashes on the premises. Section 1000 provides for the removal of ashes, etc., from a specified class of buildings. The proviso excludes from the operation of Section 1000 any building containing less than five flats.

It is insisted, however, that relator's building comes within that part of the proviso which provides that "this section shall not apply to any case where a vessel or vessels for ashes are required by the provisions of section 995 of this article," and that he is thereby relieved from removing ashes from his building at his own expense. The ordinances do not require the municipality to remove ashes from a building such as that owned by relator; neither by Section 1000 nor by any other ordinance to which our attention has been directed has the City assumed the duty of removing ashes from such buildings. The ordinance expressly provides that the owners of steam heated buildings similar to the one in question shall remove the ashes therefrom and at their own expense, and whatever may be the effect of the proviso to Section 1000, it did not by its language impose upon the City the duty of removing ashes from relator's building.

The last clause of the proviso distinguishes

between buildings containing less than five flats and those of five flats or more. The first clause of the proviso excludes from the operation of the ordinance any case where vessels for ashes are required by Section 995. To give the effect to the first clause insisted upon by relator would render the last clause meaningless as Section 995 refers to every case where a vessel is required by that section. While the ordinances in question are not free from ambiguity, we are inclined to the view that it was intended by their enactment to distinguish between buildings containing large heating plants and those containing smaller plants or which are otherwise heated.

It is insisted on behalf of respondents that the question raised by counsel for petitioner is definitely decided by the Supreme Court in the case of The People ex rel. William Webster vs. The City of Chicago et al., 277 Ill. 394. That case involved a construction of Section 1000 of the Municipal Code referred to, and notwithstanding that it is urged here that the question which the Supreme Court decided was not properly before it, we think the decision is conclusive of the material question presented on behalf of the petitioner.

In the Webster case supra the court said:

"It is not controverted that the duty of removing ashes from buildings where they are produced rests primarily upon the owner or occupant, while the city may, we think, by appropriate legislation, voluntarily assume that duty and relieve the owner of the burden, it cannot be compelled to do so. The city council of the city of Chicago has legislated upon this subject by ordinance, the sections of which having any bearing on this case are set out in our former opinion. That ordinance did not specifically state that the city should remove ashes from any building, but buildings containing less than five flats were exempted from the requirement of section 1000 that the owner of "any building" in the city of Chicago heated by steam, hot air or hot water should at his own expense remove the ashes therefrom. It appears to have been the intent of the council in passing the ordinance that ashes should be removed from apartment buildings containing less than five flats by the city at its expense, but that the ashes pro-

duced in flat buildings of five or more apartments should be removed by the owner, and according to the averments of the petition the city has been removing the ashes from buildings of less than five flats and paying the expense out of a tax levied and collected for that purpose. Appellant's building is a six flat or apartment building heated by steam and is not excepted from the requirements of the ordinance that the owner shall remove the ashes. Whether the ordinance is valid or invalid, it does not purport to relieve appellant from the duty of removing his ashes at his own expense. The city has never assumed the duty of removing ashes from buildings of the class of appellant's, but has required that duty to be performed by the owners. Because the council has appropriated money to pay the expense of removing ashes from buildings it has assumed by ordinance to serve in that manner does not entitle the owner of a building not included in the ordinance to a writ of mandamus to compel the municipality to give him the same service; and this is true even if the ordinance were invalid because of discrimination or for some other reason. The city has never voluntarily assumed the duty of removing ashes from buildings of the class of appellant's, and it is immaterial to a decision of this case whether, in passing the ordinance referred to, the council acted legally or illegally. Presumably the appropriations made and taxes collected for the removal of ashes were for the performance of that service for buildings to which the ordinance was intended to apply, and even if the exemption of buildings, of less than five flats, from the requirement of section 1000 was void, as alleged in the petition, that would not entitle appellant to the writ. Mandamus is a strictly legal remedy, and to entitle a relator to the writ he must show a clear legal right to it. People v. Blocki, 203 Ill. 363; People v. Penna, 219 Id. 346."

The Supreme Court holds that the owners and operators of that class of buildings included in the terms of Section 1000 of the ordinances have no legal right to complain of the practice of the City of collecting ashes from buildings not included in the section. This holding by the Supreme Court disposes, we think, of the question presented by relator. We are not called upon to determine the validity of the ordinances in question, nor are we required to pass upon their reasonableness. The question presented here is simply one of construction, and in the application of the rule of construction that statutes and ordinances should be so construed as that all parts thereof, if possible, may be given effect, it is not difficult to determine from the lan-

guage of the ordinances in question that the relator's building is not excluded from the operation of Section 1000 by the language of its proviso.

If it be conceded that the ordinances in question are discriminatory or that they for any other reason are illegal or unenforcible, this would not entitle the relator to the relief which he seeks. Whatever may be said in answer to the contention that the ordinances are discriminatory, the relator is not entitled of right to the service which he demands; the law does not impose upon the respondents the duty of performing the services which the relator urges he is entitled to, nor does it appear from the petition that plaintiff has shown any right to the performance of such services. (McCann v. The People, 194 Ill. 526). The city has not imposed upon itself the duty of collecting ashes from the class of buildings referred to in Section 1000 of the ordinances.

It is also insisted that the appropriation ordinance passed by the City Council on March 6, 1916, and the tax levy ordinance of March 25, 1916, required a performance of the service which relator seeks. The appropriation ordinance of 1916 provided an appropriation for the removal of ashes, etc., from residential property. The appropriation ordinance under Sections 2 and 3 of Article 7 of the Cities and Villages Act, relates solely to expenditures for the purposes specifically set forth therein. These purposes, as shown by the abstract of record, are "for the removal of ashes," etc., * * * "the maintenance and operation of dumps." The tax levy ordinance could not extend the meaning of the appropriation ordinance so as to include expenditures for purposes not specified therein.

We are unable to find anything in the language

of either the appropriation or tax levy ordinances which imposes upon the respondents the duty of collecting ashes, etc., from buildings included among those indicated in Section 1000 of the ordinances.

The judgment of the Circuit Court will be affirmed.

JACKSON AFFIRMED.

C. B. ALDRICH and C. A. CHANCELLOR,
trading as Aldrich & Chancellor,
Defendants in Error,

vs.

O. R. JEFFERS,
Plaintiff in Error.

Error to

Municipal Court

of Chicago.

209 I.A. 143

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to have reversed a judgment against him in the sum of \$735.37.

Defendant contends that the court improperly struck his affidavit of defense from the files. However this may be, we cannot consider it, as this matter has not been preserved for review by a bill of exceptions. It has been repeatedly held that where there is no bill of exceptions, a motion to strike, and the decision of the court thereon, do not become a part of the record, and it will be presumed that the action of the court was correct. Among the cases so holding are Reed v. Horne, 73 Ill. 598; Fanning v. Russell, 81 Ill. 398; Gaynor v. Hibernia Savings Bank, 166 Ill. 577; Mann v. Brown, 263 Ill. 394; Jones v. Roberts, 188 Ill. App. 609; Sheppard-Strassheim Co. v. George Nickas et al., Gen. No. 22915, this court, opinion filed October 9, 1917. As this is the only matter presented to us for consideration, in accordance with the decisions in these cases the judgment must be affirmed.

AFFIRMED.

DONALD ROSS,
Plaintiff in Error.

vs.

FRED BECKLENBERG, CHARLES
SCHLEYER,
Defendants in Error.)

Error to

Circuit Court,

Cook County.

209 I.A. 144

MR. JUSTICE MESURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover damages for personal injuries. Upon the trial the facts were stipulated, and thereupon the court instructed the jury to find the defendants not guilty, and judgment was entered upon this verdict. Plaintiff by this writ of error seeks to have this judgment reversed.

It appears from the stipulation of facts that plaintiff at the time of the accident was a building inspector employed by the City of Chicago, and that the defendant Becklenberg was the owner of land in Chicago upon which a building was in process of erection; that the defendant Schleyer was a mason contractor and engaged by Becklenberg to do the excavating and mason work in connection with the building. A contractor, W. C. Malaney, had the contract for the floors in the building; he was originally made a party defendant but was dismissed before the case was tried. The building was intended to be used as a theater building, on the corner of Halsted street and 55th boulevard. The public entrance and passageway was from Halsted street; this entrance was temporarily boarded up. Under this entrance a basement excavation had been made by Schleyer; no floor had been laid in this entrance

and passageway covering the excavation. In this entrance certain lintels had been inserted in openings, which were there temporarily awaiting the arrival of permanent lintels. The presence of these wooden lintels at the time of the accident, January 28, 1913, was in violation of the building ordinances of the City of Chicago. Prior to this time plaintiff had visited the premises and, observing the wooden lintels, had instructed the defendant to remove them and insert fireproof lintels in accordance with the provisions of the building ordinances; and on the day of the accident again visited the premises for the purpose of ascertaining whether or not his instructions had been followed. Upon the occasion of this visit the plaintiff used another means of entrance into the building, coming in from the alley, passing through the auditorium and towards the entrance and passageway. As he attempted to enter the passageway, upon which there was no flooring, he fell into the basement, receiving the injuries for which this suit is brought. This accident happened about 3 or 3:30 in the afternoon, and the entrance and passageway at the place of the accident was dark and could not be seen by the plaintiff without the assistance of artificial light, and there was no artificial light there or in any other portion of the building through which he passed. He was alone at the time, walking along slowly, feeling his way. The distance from where he entered the building to where he fell was about 120 feet, and to reach the latter point he went through the large, dark auditorium room in its unfinished condition. It further appears that prior to this accident plaintiff had not been in said entrance and passageway, but had examined the lintels along the side thereof from above by looking down into the

passageway; that the flooring in the entrance had not been put in by the contractor Malaney at the time of the accident but the space had been left open for the subsequent installation of pipes and machinery to be used in the building in connection with the heating plant.

Two considerations lead us to conclude that the action of the trial court in instructing the jury as was done was proper. First, plaintiff was a licensee, entering by permission only, to whom Becklenberg owed no duty whatever except to refrain from wilfully injuring him. Applying to the facts before us what was said in Gibson v. Leonard, 143 Ill. 182, plaintiff entered the building under a license given by law and in no way emanating from the defendant; plaintiff would have right of entry even if the owner had forbidden it. Under such circumstances the owner assumes no duty to the licensee except to refrain from wilful or injurious acts, and the licensee cannot recover damages for injuries caused by pitfalls such as this was; "he goes there at his own risk, and enjoys the license subject to its concomitant perils." To the same effect is Casey v. Adams, 234 Ill. 350. These considerations apply to Becklenberg, the owner. We do not see how, under any consideration, it could be said that Schleyer, the mason contractor, owed any duty to plaintiff except to refrain from inflicting wilful injury.

The second ground for our conclusion is that under the facts and circumstances we are of the opinion that plaintiff was guilty of contributory negligence which caused the accident, and hence is not entitled to recover. We are of the opinion that all reasonable minds would agree that it was negligence for anyone to grope his way in the

darkness through a building in course of erection, into a passageway through which he had not before walked and which from previous observation he knew was devoid of flooring. Under such circumstances it would be a matter of wonder if plaintiff did not meet with an accident. Among the cases supporting this view, involving circumstances very similar to those here present, are Bentley & Gerwig v. Loverock, 102 Ill. App. 106; Heide, v. Schubert, 106 Ill. App. 586; Sauter v. Hinde, 183 Ill. App. 415; Darrow v. The Fair, 118 Ill. App. 665.

For the reasons above expressed we hold that there was no error in the peremptory instruction given by the trial court and that the judgment should be affirmed.

AFFIRMED.

56 - 23375

THE E. R. STEGM BREWERY,
a corporation,
Appellant,

vs.

JOSEPH O. KOSTNER,
Appellee.

APPEAL FROM

CIRCUIT COURT,

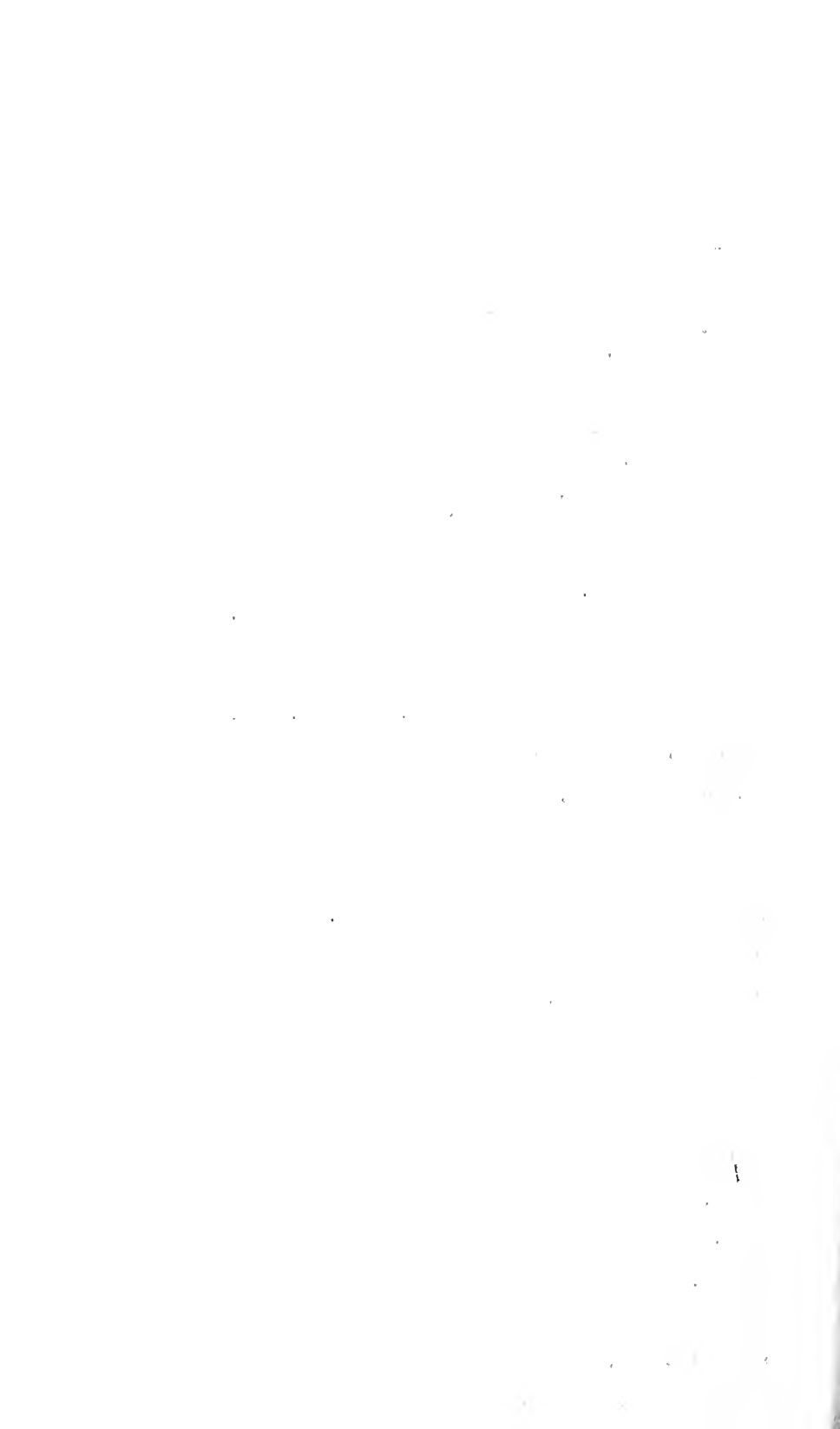
COOK COUNTY.

209 I.A. 161

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

At a prior term of this court we filed an opinion in this cause (reported in Vol. 203 Ill. App. 416) reversing an interlocutory injunction that had been entered on the bill of complaint, the answer and certain affidavits, restraining defendant Kostner from prosecuting a forcible detainer suit. After such reversal the bill was amended and a general demurrer thereto sustained. This appeal is from the order sustaining said demurrer and dismissing the bill for want of equity, and merely presents the question whether the amendment changed the character of the bill so as to present a case for equitable relief.

The right to such relief is predicated on the claim of an equitable estoppel, the essential elements of which, we held in said opinion, are not found in the original bill. We there said that the claim of an equitable estoppel rested, not on anything said or done by defendant Kostner which misled or induced complainant to change its position to its detriment, nor any privity of contract or relationship between them, but mainly on the circumstances that prior to March 1, 1916, at a time when Kostner had merely a contract



to purchase the real estate in question that was never consummated, and when he had no legal or equitable title thereto, he asked the president of complainant, which held the premises under a lease expiring September 30, 1916, but giving an option until March 1, 1916 for an extension thereof, whether complainant intended to exercise such option, and on being informed that it did, attempted to purchase its interest in the lease; and that later on May 1, 1916, the lessor deeded the property to one Rothchild, who on the same day executed a ninety-nine year lease thereof to Kostner subject to complainant's lease. The amendment merely introduced the additional fact that on the same day that Kostner secured the ninety-nine year lease, he also obtained an assignment of the lessor's interest in complainant's lease.

It does not appear from the amended bill, construed as it must be most strongly against the pleader, that Kostner ever consummated his contract to purchase, or that complainant ever exercised its option before March 2, 1916, or that complainant's lesser ever recognized complainant's right to exercise such option after March 1, 1916 or ever acquiesced in complainant's belated notice of its exercise of such option contained in its pleaded letter of March 7, 1916.

It is argued in effect that if, as we held, no privity of contract or relationship arose from the circumstances pleaded in the original bill, it did arise when such circumstances are considered with the additional fact pleaded in the amendment. We fail to see that such assignment had any logical connection with the preceding circumstances, or that it gave to them any color whereby they possessed a different significance than when taken alone.



At most the assignment merely put Koetner in the lessor's shoes at a time when the latter was under no obligation to extend the lease, so that if there was no privity of contract or relationship between Koetner and complainant then he was not obliged to grant the extension claimed. What was said in our other opinion is therefore as applicable to the amended as to the original bill and need not be repeated. The order will be affirmed.

AFFIRMED.



THE NATIONAL BANK OF THE
REPUBLIC,

Appellee,

vs.

PAUL GERHARDT,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 168

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against appellant as guarantor of a note given to it as payee by Frank S. Bartzen, Peter Bartzen and Peter Bartzen, Jr. the makers. There was a directed verdict for appellee and the controlling question is whether there was any evidence tending to establish the defenses pleaded.

The final amended affidavit of merits set up two defenses, want of consideration and a surrender of security by plaintiff that operated to release defendant from his guaranty. There was no attempt to prove the former defense.

The main facts shown by undisputed evidence are as follows: Some time prior to December, 1910 Frank S. Bartzen opened an account with the plaintiff bank. At that time he had been extended a credit of \$16,000 which was evidenced by notes and endorsements of the makers of the note in question. This credit was increased \$4000 on their giving an additional note for that sum, bearing the guaranty of defendant. The note was dated Dec. 17, 1910 and renewed from time to time up to Nov. 1, 1912 when it was again renewed by the note in question. In April, 1912 the bank calling for further security, Peter Bartzen, Jr. gave his individual note for \$18,000 secured by a trust deed of certain

lots, dated April 26, 1912. The indebtedness at that time amounted to little over \$17,000, and four days later the notes covering the same were renewed, one for \$13,097.95, and one for \$4000. The former was in the ordinary form of a collateral note reciting that the secured note for \$18,000 was pledged as collateral thereto, and the other was in the same form as that renewed, a plain note of hand for \$4000 making no reference to collateral, and bearing Gerhardt's guaranty. There were frequent renewals of these notes by notes in the same form respectively. The amount of the former, however, was reduced by payments from sales of some of said lots released from the trust deed with plaintiff's consent.

The defense relied on was that the trust deed was given to secure the whole indebtedness, and that the releases were made without defendant's knowledge or consent, whereby he was deprived of protection plaintiff was obligated to give him and released from liability.

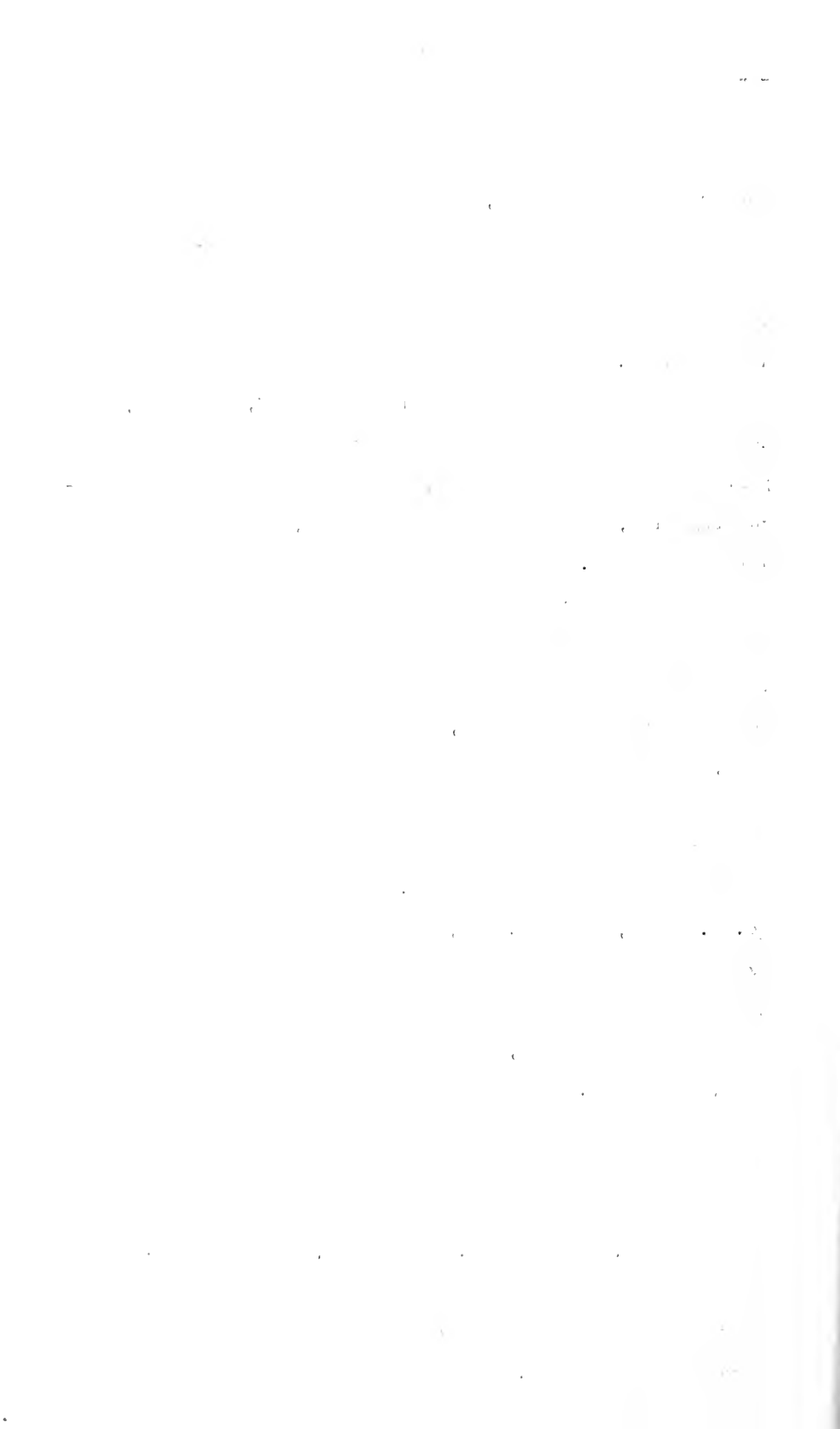
Whether there was such an obligation depends on whether the note for \$18,000 was intended as security for the entire indebtedness existing when it was given. If there was no evidence reasonably tending to show such an intention then there was no basis for the defense.

The testimony of the parties to the transaction for the security, namely two of the Bartzens and the bank's attorney, was explicit to the effect that there was a distinct verbal agreement that the note for \$18,000 and trust deed securing the same were given and taken to secure the unsecured debt represented by the collateral note and not that guaranteed by Gerhardt. Not only was this testimony not directly disputed nor impeached, but it was supported by the practically contemporaneous execution of two notes covering

the entire indebtedness, to the payment of only one of which was the security expressly pledged as aforesaid. Defendant was not a party to the arrangement and had no knowledge of the giving of said security until after he guaranteed the note sued on.

There was direct undisputed proof, therefore, of an intent to apply the additional security only to the unsecured part of the debt to the bank, unless the bank should subsequently find, as does not appear it did, that Gerhardt was not responsible.

Defendant had the burden of proving his defense. From the circumstance that when the note for \$18,000 was given the entire indebtedness to the bank was only about \$17,000, he argues as the inference, a purpose to secure the entire debt, notwithstanding the undisputed evidence to the contrary and evidence also to the effect that the amount of \$18,000 was fixed to cover possible expenses of foreclosure and to secure possible further credit. As said in Chicago Un. Tr. Co. v. Hampe, 228 Ill. 346, "It cannot be said that the existence of a certain fact may reasonably be inferred from the evidence when the existence of another fact inconsistent with the first can be, from the same evidence, inferred with equal certainty. The evidence must point to the existence of some particular fact rather than to the existence of another fact inconsistent with the first before it can be said that such evidence alone tends to prove the existence of the first." (Condon v. Schoenfeld, 214 Ill. 226.) The amount of the collateral cannot be considered separate and apart from undisputed and unimpeached testimony as to the purpose in fixing it. Such amount is as consistent with such expressed purpose as with the inference without the explanation.



It not being inconsistent with either theory, that based on affirmative evidence and that resting on a mere inference, the circumstance of the amount alone has of itself no probative value. The latter theory cannot be maintained when it is not the only conclusion that can fairly or reasonably be drawn from the circumstance of the amount. (Neal v. Chi. R. I. & Pac. Ry. Co., 129 Iowa 5; 2 L. R. A. (N. S.) 905.)

It is further urged that defendant's contention is supported by the fact that when he was pressed for payment the bank's attorney offered by letter to release certain lots to Bartzen if Gerhardt paid the note in question within a specified time. But it was expressly stated in the letter that the bank did not recognize any right on the part of Gerhardt to such a release, but that the offer was merely made to assist Bartzen, This was supplemented by corroborative testimony that the offer was at Bartzen's request.

We think, therefore, that there was no evidence that required submission of the case to the jury. With this view we need not consider other points in the case.

There was a set off for a payment made by Gerhardt on the note. But it rests on the same basis as the defense.

AFFIRMED.



469 - 22903

ELIZA FERGUSON, Appellee,

vs.

STATE BANK OF WEST PULLMAN, Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209 I.A. 169

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit for the conversion of a bond of the face value of \$1000. The court denied defendant's motion made at the close of plaintiff's evidence for an instructed verdict, whereupon defendant rested its case. The jury rendered a verdict for the plaintiff in the sum of \$1000. The usual motions for a new trial and in arrest of judgment were made and overruled.

The matters argued by appellant relate to the assignment of error that the verdict is not supported by the evidence.

Plaintiff's evidence discloses that she was in the employ of Charles D. Rounds, then president of appellee bank; that she had an account of about \$1000 in another bank transferred to appellant bank with which was purchased from the latter a bond of the face value of \$1000 and delivered to Rounds; that twelve days later Rounds brought the bond back and negotiated a sale of it to the bank at the same price; that in each instance the transaction was conducted at the bank by Rounds and its cashier, the former appearing to act for appellee and the latter as the fiscal agent of the bank.

When Rounds delivered the bond to appellee she requested him to retain it for safe-keeping. She never authorized its sale nor knew of it until after Rounds' death a year or so later. The bond was subsequently resold by the bank. Rounds, however, handed appellee one of the bank's pass books containing a credit for the first semi-annual interest accruing after her purchase of the bond, and as each interest installment accrued she handed the pass book to him and he returned it to her containing a credit entered therein by him of the payment of such installment. No other book of the bank contained entries to her credit, and apparently no other officer of the bank knew she had the pass book.

The circumstances indicate that the bond was transferable by delivery and that the cashier knew or had reason to believe that it belonged to appellee when it was repurchased by the bank. Tending to establish his knowledge thereof was testimony of his admission after Rounds' death to Mrs. Ferguson when she went to the bank with her pass book, that at the time of the bank's repurchase of the bond he thought it strange she should sell it so soon, and that "he had a recollection of making out the card for the deposit" (referring presumably to the proceeds of the sale) and had asked Rounds about her making it and that Rounds had told him "she would be around in a few days."

The theory of the defense is that the instrument being negotiable by delivery and Rounds having acted in a representative capacity for appellee, she invested him with the indicia of ownership and is bound by his act of sale. But accepting appellant's own theory of Rounds' agency for appellee in buying the bond and keeping the same, in view of the above circumstances we think it clear that the cashier, who acted as



the fiscal agent of the bank, not only knew that the bond belonged to Mrs. Ferguson at the time it was bought back by the bank but was put on inquiry into Rounds' authority to sell it; and in view of his failure to make such inquiry the bank cannot be placed, as contended, in the light of an innocent purchaser of a negotiable instrument without notice. We think, therefore, the evidence justifies the verdict. This conclusion dispenses with the necessity of discussing any other questions all of which are predicated upon the insufficiency of the evidence.

AFFIRMED.

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JAMES G. SCOVERY, doing business
as J. G. Scovery & Co.,

Appellee,

vs.

SAM SCHEVLEN and ISADORE MAC-
KAVICH, doing business as
Schevlen Produce Co.,

Appellants.

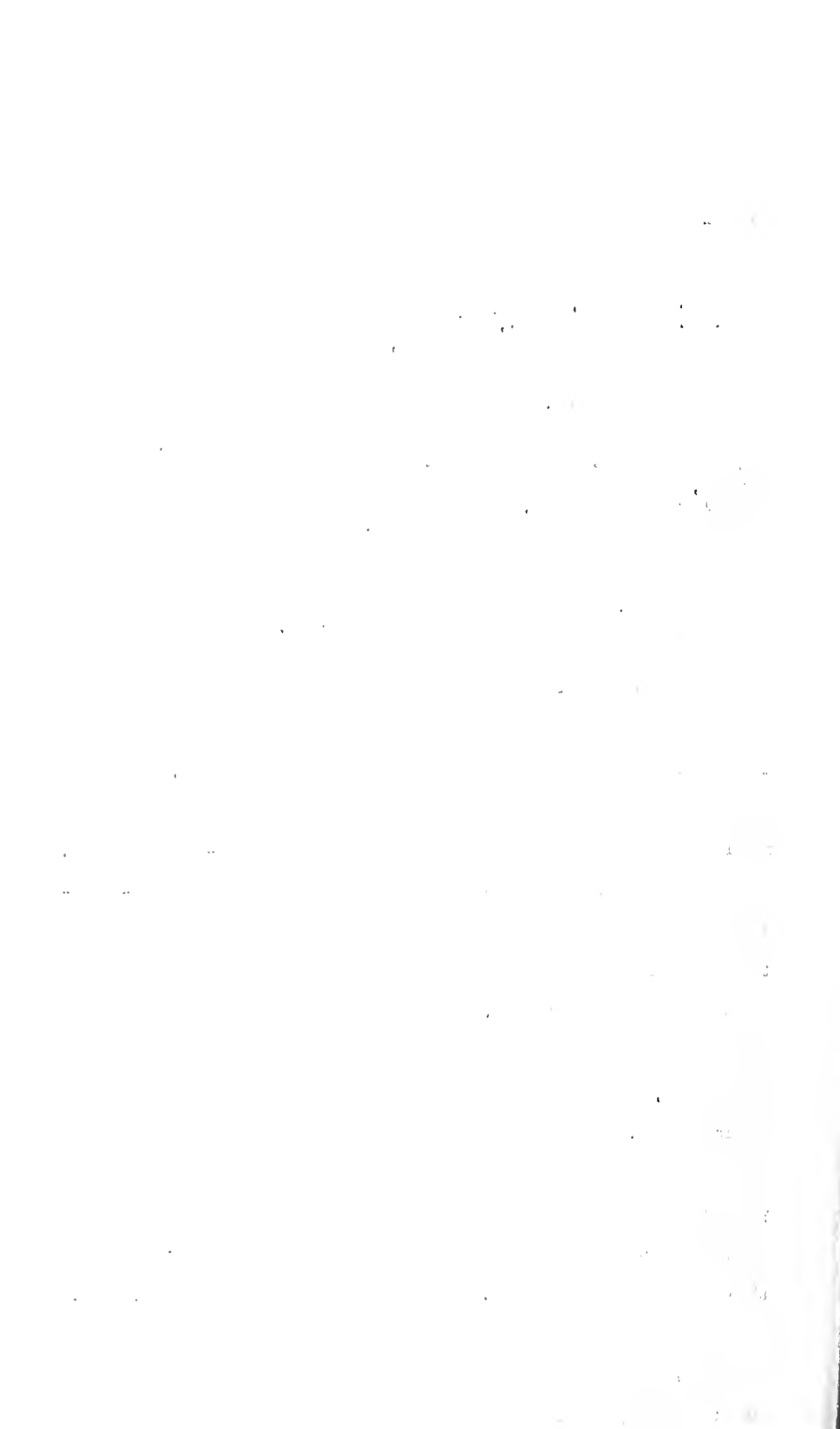
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 170

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The real question at issue in this case on the trial was whether the defendants were co-partners in the transactions upon which the judgment was rendered against them, and the appeal presents the question of the admissibility of evidence relied on to establish the existence of the co-partnership.

Plaintiff adduced proof of admissions of co-partnership made to him by both defendants prior to and about the time of the transactions in question, tending to establish a partnership by estoppel. It is urged that as some of these admissions were made by one defendant out of the presence of the other, they should have been restricted to the defendant making them. They were admissible as to the one making them, and while no instruction restricting their effect was requested, yet it has been held that several admissions of persons sued as partners are equivalent to a joint statement by all that they are in partnership. (See cases cited in 30 Cyc. 408.) Besides there was proof of admissions to plaintiff when both defendants were present to the effect that they were partners and that they would continue the business for awhile under the name Schevlen Produce Co., under which plaintiff had

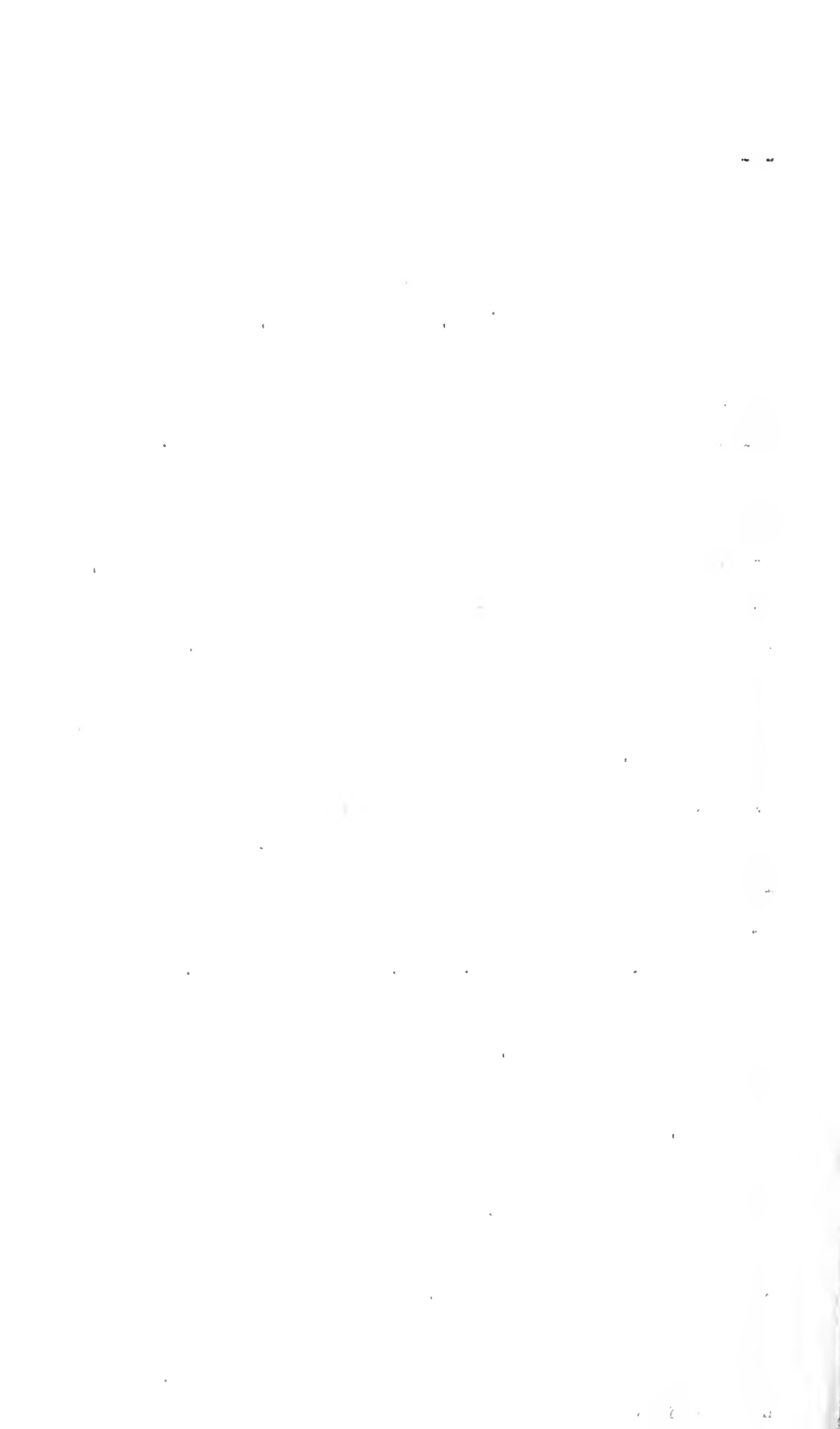


previously dealt with Schevlen.

It was immaterial, as we view it, that there was a corporation by that name so long as the plaintiff was ignorant of it and was induced to do business with appellants holding themselves out as partners under that name.

Evidence was also received over objection of similar representations made about the same time by defendants to other parties with whom they had similar transactions, and it is argued that while plaintiff might rely on admissions to him to establish a co-partnership by estoppel, he did not rely on admissions to third parties of which he had no knowledge, and that hence they were not admissible in evidence. If plaintiff's case rested on such representations or admissions alone the point would be well taken. But as there was other evidence tending to establish an actual co-partnership we think it could properly be reinforced by the conduct and representations by which defendants held themselves out to the public as partners. (See 30 Cyc. 414c. and cases cited.)

Defendants did business together only a few months before the firm failed, and during that period each contracted for merchandise in which the firm dealt and paid bills incurred therefor, and received moneys from the business which were deposited to their individual accounts as seemed convenient for its use in the business. The evidence does not disclose what was done with all the moneys so received and deposited in their individual accounts, whether a portion thereof was appropriated for individual purposes or not. Mackavich advanced money for the business, as a loan he states, but after he came into the business no bank account was kept in the



name of the corporation.

Under all the proof and circumstances which we do not undertake to state at length, we think there was prima facie proof of a co-partnership by reason of which evidence to the effect that defendants by conduct and representations held themselves out as partners to others was admissible against them.

While they denied the existence of a co-partnership there was sufficient evidence before the jury wherein the existence of one, and of an ulterior purpose of masking it under a corporate name, might be inferred. The record may not be free from error but we do not think the errors complained of are such as should cause a reversal of the judgment.

AFFIRMED.



482 - 22916

EDMUND S. GRAF,
Appellee,

vs.

MORRIS PERLMAN and ABE
TELECHANSKY,
Appellants.

APPEAL FROM
MUNICIPAL COURT

OF CHICAGO.

209 I.A. 17²

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in the Municipal Court of Chicago confirming a previous judgment by confession entered on appellants' two notes for \$200 each and interest, made payable to the order of appellee, dated respectively November 10th and December 9th, 1915. By order of the court an affidavit by appellant Perlman, upon which the judgment by confession was vacated, stood as the affidavit of merits in the cause, and also as a defense to another judgment by confession entered the same day against Perlman on his note of a previous date for \$100 and interest, also made payable to the order of said Graf. The latter judgment was also confirmed and appealed from, being case Gen. No. 22917. The two causes on their reinstatement were heard on the same evidence below and have been consolidated for hearing in this court.

The substance of the affidavit is that Telechansky and Perlman entered into a written contract with Graf to purchase a certain piece of real estate, on the signing of which the note for \$100 aforesaid was given as security; that

defendants having failed to perform their part of the agreement within the stipulated time, plaintiff extended the time therefor to November 10th, on their executing and delivering the note of that date, and that at their request he granted another extension on the execution and delivery of the note of December 9th. After a recital of such facts the affidavit - made April 26, 1916 - proceeds to state as the ground of defense, "that the express understanding under which these notes were given was that the time would be extended to May 15th, 1916, and that therefore at this time there is no consideration for the notes as the plaintiff has violated his promises."

The only fact pleaded over which there was any controversy was the time to which the final extension was made. While the evidence thereon is conflicting it is not such as to justify a reversal of the court's finding.

But even if plaintiff wrongfully violated his promise of extension which the affidavit clearly indicates was the consideration of each of the two notes here involved, the failure to perform the same would not constitute a want or failure of consideration. Cage v. Lewis, 68 Ill. 604; Smith v. Western Guaranty Co., 150 Ill. App. 587; Trask v. Vinson, 37 Mass. 105.

The defense raised, however, does not seem to have any application whatever to the notes given for the first extension which was granted, nor to the note for \$100. Regardless of the limitation of the issue thus presented by the affidavit the court heard testimony relating to Graf's right to convey the real estate and to the value of the land. One of defendants' theories in introducing such evidence was

that the notes in question, if enforceable, could be regarded only in the nature of a penalty and not as liquidated damages for failure of defendants to keep their contract. Such a question was not raised by the affidavit and cannot be considered.

Another contention made by appellants is that plaintiff had no title to the land but merely an option to buy the same which he never exercised, and that defendants had no valid agreement with the owner for a conveyance of the land and none with, or that could be enforced against, appellee. The affidavit presented no such issues. In fact it admits that their contract was with appellee, and relies on their readiness to perform within the period of extension.

Besides the evidence tends to show that the so-called option contract between appellee and the owner recognized appellee's right to assign the same, and that the contract with appellants, though made in the name of the owner without express authorization, was impliedly confirmed by his depositing in escrow a deed to appellants for the land in question to be delivered on performance of certain conditions.

But the legal status of such contracts is not open for discussion for the issue made by the defense was merely one of failure of consideration by reason of plaintiff's violation of his promise. On that proposition the authorities above cited are to the effect that a promise or executory agreement is a sufficient consideration for a promissory note, even though the maker of the note loses the benefit of the promise. The judgment must be affirmed.

AFFIRMED.

483 - 22917

EDMUND S. GRAF, Appellee,

vs.

MORRIS PERLMAN, Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 174

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment in the Municipal Court confirming a judgment by confession on appellant's note for \$100 and interest, made payable on demand to the order of appellee, given, as the affidavit of defense shows, as additional security by appellant and his partner, Abe Telechansky, for the performance of a real estate contract. The affidavit of defense also related to two other notes subsequently given on a promise of extension of time for the performance of the contract, and the defense therein stated amounts to a plea that the promise being violated, the consideration failed, - a defense that had no application whatever to the note in question. The affidavit states no other or legal defense to said note, and hence the judgment thereon must be affirmed.

This appeal was consolidated for hearing with that in the case of Edmund S. Graf v. Abe Telechansky and Morris Perlman, General No. 22916, wherein a judgment was rendered on the two notes referred to in said affidavit, and we have this day filed an opinion in the latter case to which reference for a fuller statement of facts is hereby made. It will be seen therefrom that no legal defense was made to any of the notes.

AFFIRMED.



493 - 22927.

STELLA SMITH,
Appellee,

vs.

DR. P. M. SWINEHART,
Appellant.

Appeal from

Municipal Court

of Chicago.

209 I.A. 175

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee recovered a judgment for \$25 against appellant as damages for negligent dental work. The principal contention by appellant is that the evidence is insufficient to sustain the court's finding and judgment.

The abstract shows no objection taken to most of the evidence complained of. But even though the evidence was objectionable, as the hearing was without a jury the court presumably based its finding on the material evidence only, which, we think, is sufficient to sustain the judgment.

There was sufficient evidence to show that the work was negligently done ^{that} and the defendant was responsible therefor, the work having been done partly by himself and partly by an employe in his office working for him or under his direction. Under such circumstances it was unnecessary to allege in the statement of claim, as contended, either that the employe made the agreement for the work or performed the same, both having been done in his capacity as agent for appellant.

Nor, as contended, was it material whether the employe was a licensed dentist or not. Neither the license nor the want of one would excuse his negligence and the lia-

bility of his principal therefor. The judgment will be affirmed.

AFFIRMED.

498 - 22932

WILLIAM H. WOHLBERG,
Appellee,

vs.

MERCHANTS RESERVE LIFE
INSURANCE COMPANY, a corp.,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 176

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment entered on a verdict for the amount of two insurance policies issued by appellant to one Carlsen and made payable to appellee as "creditor".

It is first urged that appellant was not a creditor of Carlsen and had no insurable interest in his life. The point is irrelevant as Carlsen took out the policies on his life and paid the premiums thereon, and under such circumstances could make them payable even to a stranger. (Bloomington Mutual Benefit Ass'n. v. Blue, 120 Ill. 121; Stake v. Stake, 228 Id. 630.)

It is next urged that the statements in the applications of the insured as to his health and as to consulting physicians were warranties, and, being false, avoided the policies. On this point it is enough to say that this was not made an issue under the pleadings. Aside from the immaterial issue that plaintiff was not a creditor the only issues of fact raised by the affidavit of defense were (1) ^{said} whether/Carlsen was of unsound health at the time of the delivery of the policy, relating to which were averments of false representations bearing upon his previous health, (2)

whether he falsely stated that he had no policy in the Massachusetts Mutual Life Insurance Co., and (3) whether proofs of death were proper and were false, fraudulent, untrue and not made in good faith. None of these issues present the defense of a breach of warranty, hence the subject is not open for discussion even though instructions thereon were given to the jury at defendant's request, and although appellee has seen fit to take up the argument by contending that the alleged warranties must be construed as representations. We cannot review issues not presented by the pleadings, or recognize that they can be injected into the case by mutual discussion of them on the mistaken theory that they are in.

Respecting the applicant's state of health at the time of the delivery of the policies there was conflicting evidence requiring its submission to the jury. In rebuttal of defendant's evidence of statements by the applicant bearing on the subject contrary to those contained in his application for the policies in question, plaintiff was permitted, over objection, to introduce certain copies of Carlsen's applications for policies in two other insurance companies made prior to his application for the policies in question and also the medical examiner's reports accompanying them. The main purpose of these documents was to show that Carlsen had given similar answers in other applications. Manifestly such selfserving statements were not admissible in any form to refute defendant's evidence, and had no tendency to establish the truth, or to deny the falsity, of the applicant's statements in the applications under consideration. This evidence bore directly on a vital issue of fact in the case, whether or not Carlsen was of unsound health when the policies in question were delivered. Being such and

erroneously received, it was prejudicial and for that reason alone the judgment must be reversed and the cause remanded for a new trial.

In this view of the case we deem it unnecessary to discuss other points argued, some of which we do not think are involved in the issues, and others are not likely to arise again.

REVERSED AND REMANDED.

AMERICAN CONTRACTING & SUPPLY
COMPANY, a corporation,
Appellee,

vs.

SPEEDWAY PARK ASSOCIATION, a
corporation,
Appellant.

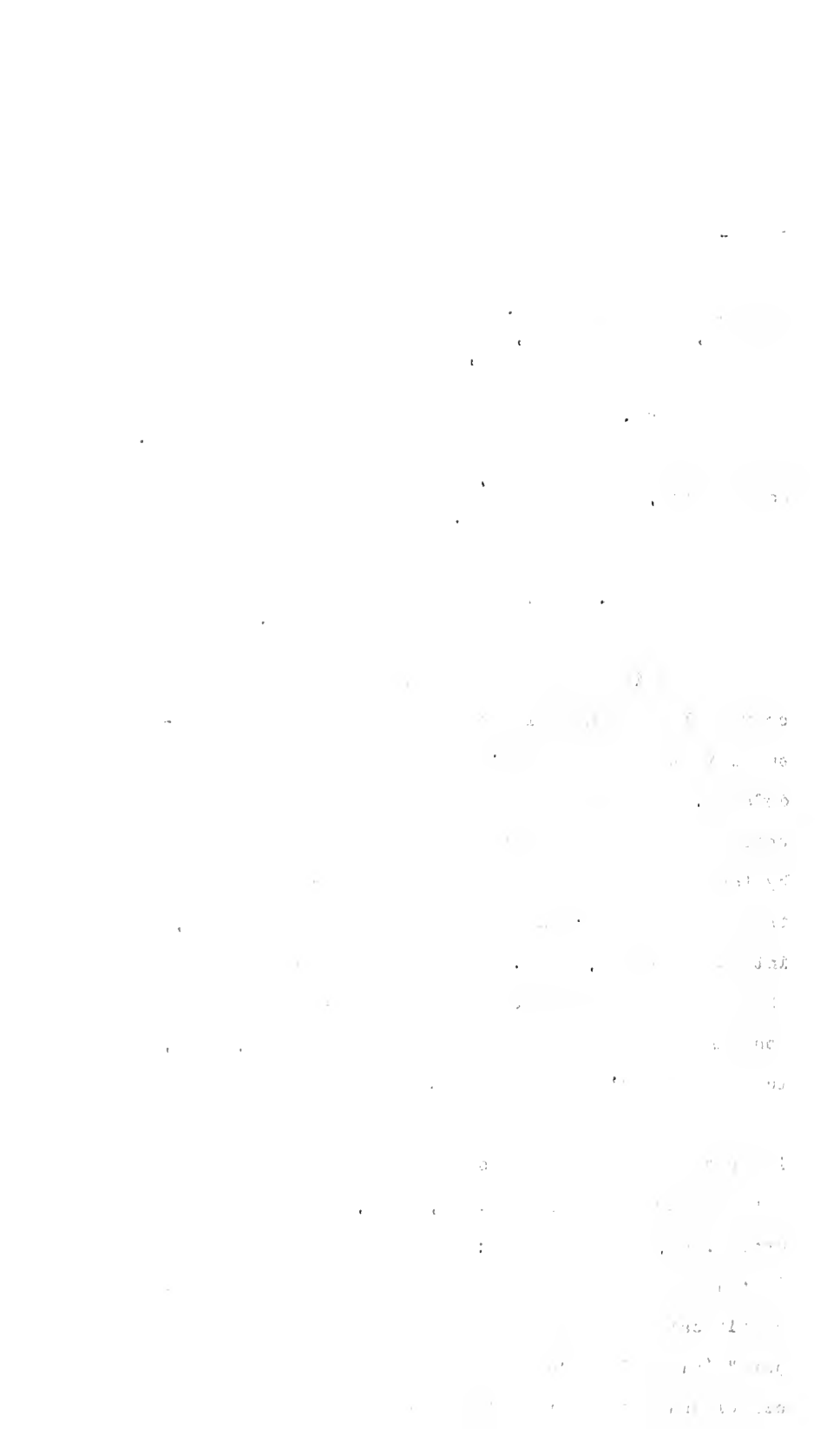
APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 177

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal presents the question whether the court below erroneously struck from the files as insufficient the defendant's amended affidavit of merits or defense. The suit was brought on certain certificates which had been issued to the plaintiff Contracting Company by the defendant Association pursuant to a contract between them for construction work on defendant's premises, entered into December 15, 1914. Each certificate contained provisions that appellee was entitled to the amount thereof for work done under said contract on or before July 31, 1915, and also to a mechanics' lien therefor.

In settlement of a dispute arising after the issue of said certificates another contract was entered into between the parties, April 15, 1915, containing, among other provisions, the following: "The party of the first part" (defendant) "hereby recognizes and agrees to pay all certificates heretofore issued to the party of the second part" (plaintiff) "upon the presentation of all waivers of all claims for possible liens and agrees that the execution of this agreement or anything herein contained shall in no way



affect the mechanics' lien of the party of the second part."

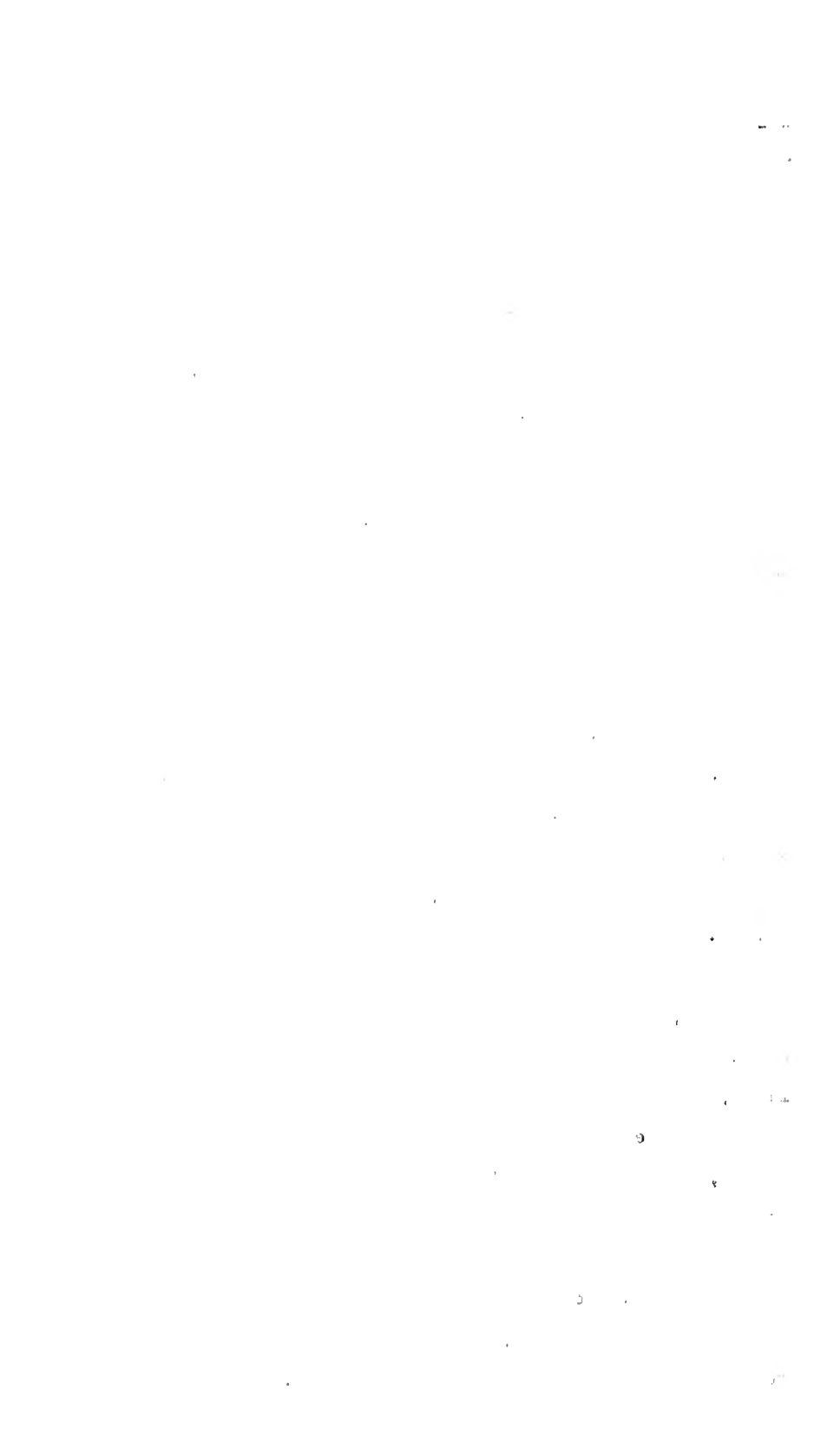
Whether the court erred in striking the affidavit of merits depends on the construction to be given to the words "upon the presentation of all waivers of all claims for possible liens" as applied to undenied, and, what we deem, controlling averments in the statement of claim.

It sets forth that plaintiff had paid for all materials used in the construction work and for all labor and services employed in connection therewith except for certain material furnished by Wm. E. Dee Co., a corporation, and certain services performed by one Michael J. Sampson; that for the amount due the latter some of said certificates not here sued on were given to him; that on March 28, 1915 he died and on April 17, 1915 one Charles Heller became the administrator of his estate; that plaintiff and the said two only remaining unpaid sub-contractors each filed a mechanics' lien; that a suit to foreclose the Dee Company's lien and one to foreclose plaintiff's lien were instituted on June 19 and July 8, 1915, respectively; that no suit was ever instituted to foreclose the Sampson lien; that no other liens by other parties, or cross bills in the foreclosure suits, had been filed; that on October 16, 1915, prior to the institution of this suit or any other against defendant than those above stated, plaintiff demanded payment of the certificates herein sued on and at the same time presented and tendered a written waiver by each of the parties named, namely, plaintiff, the Dee Company, and the administrator of the Sampson estate, of his mechanics' lien or liens together with duly executed motions to dismiss the pending suits of the Dee Company and of plaintiff.

The affidavit of merits fails to make an explicit denial of any material averment in the statement of claim but is in the nature of an argument with mere conclusions of either fact or law. Without a specific denial, as required by the rules of court, of plaintiff's averments that there were no other claims for possible liens than those above stated, and without denying averments of fact from which it appeared that no other mechanic liens could be asserted, the affidavit of defense seeks to raise an issue on the subject merely by a general averment that plaintiff failed to present to the defendant "waivers of all claims or any claims for possible liens" which might be made by sub-contractors and material men, and alleged what is not material to the issues, that plaintiff had not paid the claims of the Dee Company and Sampson. Neither of these averments was sufficient to raise an issue of fact as to whether plaintiff had presented waivers of all possible liens, which was all the contract required.

Nor did the affidavit of defense make an express denial of, and thereby take issue on, the averment that plaintiff presented and tendered waivers of all possible liens, by simply averring that defendant was never permitted to have possession of the papers or submit them to its attorney; and the pleader's conclusion therefrom that it did not accept service or delivery thereof. The affidavit contained no allegations of fact from which such a conclusion was inferable. It did not aver that when said papers were "presented and tendered," that it ever made or was denied the request of an opportunity to examine them.

Nor was the averment in said affidavit that such



papers were never delivered by the parties whose names appeared thereon material to the controversy. The contract contained no such requirement.

The other averments in the affidavit of defense are mainly conclusions of law, that without the extinguishment of said sub-contractors' liens and dismissal of the Dee Company suit there was no right of recovery, that the administrator had no power or authority to waive his lien without payment of the claim or an order of the Probate Court, and that the quoted provision in question constituted a condition precedent that was not performed.

These questions of law do not rest upon any specific denials of fact alleged in the statement of claim. They were probably raised under the Municipal Court practice, by defendant's motion to strike the statement of claim by which, after it was denied, it did not abide but attempted instead to raise an issue of fact by its affidavit of defense, hence the question whether the affidavit presents a material issue of fact. We think not.

Whether the provision in question be deemed a condition precedent or not, plaintiff alleged it was performed by presenting such waivers, and defendant attempts to meet the averment by stating in effect that the mere presentation of a waiver was not sufficient, but that a performance of the condition required an extinguishment of the liens. This goes to the construction of the provision and not to a question of fact. But as we construe the provision and the contract in which it is inserted, it was contemplated that payment of any certificate would be made if the demand therefor was accompanied by proper waivers of all mechanics' liens whether they existed or were legally possible on the existing facts,

and that such presentation and payment were to be concurrent acts. It did not provide for the absolute extinguishment of such liens but for the presentation of an instrument whereby plaintiff could defeat any attempted enforcement of them, thus protecting it from liability for double payment. If anything more had been contemplated the poverty of language is not such that it could not have been plainly expressed.

What has been said with respect to the extinguishment of the liens applies equally to the dismissal of the suits. We need not therefore discuss whether the tendered motions to dismiss the suits were adequate for the purpose.

As to the insufficiency of the administrator's waiver without an order of the Probate Court authorizing its execution it is sufficient to say that the pleading raised no question of fact as to the non-existence of such an order. Nor do we think the sufficiency of the waiver by the administrator without payment of his certificate was an issuable fact. The statement of fact showed that the time for beginning a suit on his lien had already passed.

A close analysis of the pleadings shows that the affidavit of defense did not meet the requirements of the court's rules as to specific denials, or as to averments of fact by way of confession and avoidance, and defendant does not appear to have asked leave to file a better pleading.

The judgment was duly entered and will be affirmed.

AFFIRMED.

505 - 22939

AMERICAN CONTRACTING AND
SUPPLY COMPANY, a corporation,
for use of WILLIAM E. DEE
COMPANY,

Appellee,

vs.

SPREEDWAY PARK ASSOCIATION,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 119

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal presents the identical questions considered and decided in case No. 22940, a suit of the same nature brought against this appellant by the American Contracting & Supply Company in its own right, in which we have this day filed an opinion.

The only question involved in either case is whether the court below erred in striking defendant's affidavit of merits from the files on the ground of its insufficiency.

Both suits were brought on certain certificates issued by appellant in payment of certain construction work done for it by said Contracting Company, the main difference being that the other suit was brought by the contractor on the certificates it still held, and this suit was brought by it for the use of a sub-contractor, the William E. Dee Company, on some of the certificates that had been assigned to the latter.

The pleadings in both cases contained substantially the same averments differing with only such modification as was necessary to state the differing relations of plaintiff.

There is no material difference in the legal questions involved and what was said in the other opinion is controlling in this case. It is urged in this case, however, that the suit being on a negotiable instrument should have been brought by the Dee Company. This too was a question of law properly raised on the motion to strike the statement of claim. But it does not appear that the certificates had been endorsed over to the Dee Company but merely that the claim represented thereby had been assigned and transferred to it, thereby rendering it proper to bring the suit for use of the assignee. Hence, the judgment below will be affirmed for the same reasons ~~XXXXXXXXXXXXXX~~ stated in said opinion.

AFFIRMED.

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CHARLES HELLER, As Administrator
of the Estate of MICHAEL J.
SAMPSON, Deceased,

Appellee,

vs.

SPEEDWAY PARK ASSOCIATION, a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209 I.A. 181

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal presents the identical questions considered and decided in case No. 32940, a suit of the same nature brought against this appellant by another party, the American Contracting & Supply Company, in which we have this day filed an opinion.

The only question involved in either case is whether the court below erred in striking defendant's affidavit of merits from the files on the ground of its insufficiency.

Both suits were brought on certain certificates issued by appellant in payment of certain construction work done for it by said Contracting Company, the main difference being that the other suit was brought by the contractor on the certificates it still held, and this suit was brought by the administrator of the estate of a sub-contractor on some of the certificates given to the latter for his services.

The pleadings in both cases contained substantially the same averments differing with only such modification ^{was} necessary to state the differing relations of

the plaintiffs. There is no material difference in the legal questions involved and what was said in the other opinion is controlling in this case. It is urged in this case, however, that the affidavit of defense called for proof of the assignment of the certificates sued on to Sampson. It is enough to say that it was not denied. Hence, the judgment below will be affirmed for the same reasons stated in said opinion.

AFFIRMED.

NELLIE HAVERN ~~et al.~~,
Appellees,

vs.

NATIONAL COUNCIL OF THE
KNIGHTS AND LADIES OF
SECURITY,
Appellant.

APPEAL FROM
COUNTY COURT OF
COOK COUNTY.

209 I.A. 132

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment in favor of appellees as beneficiaries of a benefit certificate issued by appellant, a fraternal beneficiary society, to their brother Wm. Houlihan, deceased. The pleas relied on alleged that the statements in his application for membership in the society were warranties and contained two false statements, (1) that he had only one brother dead and (2) that he had no sister dead. The case was tried on the theory that these were material representations and warranted to be true. The replications denied that the member made such statements and further alleged that the history of his family was given and known to defendant at the time of his application.

In support of its pleas defendant called plaintiff Nellie Havern, sister of deceased, to give the family history. Her testimony discloses that a brother James had died at the age of 40 years of typhoid fever, and that a sister Catherine had died at the age of 35 of typhoid pneumonia; that both died in Chicago where William resided after the latter was 20 years old and before he made his application.

To support the replications reliance was placed on the rebuttal testimony given by Nellie Havern and Mary Thornton. Over defendant's objection the former was permitted to testify that a few months before William joined she joined the same local council of the defendant society, and that at the time of making her application she gave a complete history of the Houlihan family to the then medical examiner, Dr. Porter. The court denied a motion to strike out the testimony of her conversations with Dr. Porter.

Mary Thornton, who was present when Dr. Boland, the medical examiner, filled out the application for William, testified that as he "could not recollect where his family was or knew anything about them" she was asked to impart the information. When asked to particularize what she said, she testified: "I told him about the family as far as I knew. I cannot tell you positively just what I said. I remember giving him about Daniel, and he asked me what doctor attended him in his last illness and I am positive I said Dr. Dwyer." The application referred to Daniel's death but not to James or Catherine's, and the witness did not testify that she gave any information as to the death of either of them. The court also denied a motion to strike out her evidence.

At the close of the evidence after a motion was argued to direct a verdict for defendant plaintiffs recalled Mrs. Thornton to supply the manifest deficiencies in her testimony, but for obvious reasons she was not permitted to testify further thereon.

The jury were properly instructed, we think, that the statements in William's application were material and constituted warranties, and it is clear that without the evidence of Nellie Havern and Mary Thornton the jury had no



evidence before them to support plaintiffs' replication. The purpose of their testimony was to show that the defendant knew of the death of William's brother James and his sister Catherine. But the testimony of what Mary Thornton told the examiner, failed to disclose that she gave any information pertaining to their deaths, and that given by Nellie Havern was clearly irrelevant, immaterial and incompetent.

There was no pretense that Nellie Havern's application contained statements respecting their death. If it did, her application was the best evidence thereof; if not, the mere fact that they were made orally to Dr. Porter, whether an agent of the society or not, would not, in our opinion, constitute competent evidence of notice to the society of such facts, except, possibly, as the question might be raised respecting her own application. It was, therefore, reversible error, in our opinion, not to strike the evidence of both of these witnesses on which the jury had to rely in reaching their verdict, and also reversible error to give instructions predicated upon such incompetent evidence,

Accordingly the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

E. M. BARBITT and M. H. BIRD,
doing business as MILLET
ELEVATOR COMPANY,

Appellees,

vs.

GRAND TRUNK WESTERN RAILWAY
COMPANY,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 183

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This suit is on a breach of contract for loss of goods in an interstate commerce transaction brought by the shippers against the initial carrier. When first brought the receivers of the delivering carrier were also made parties defendant. They were subsequently dismissed out of the action and the statement of claim was amended so that it lay against the initial carrier only. The mere statement of these facts would seem to make it unnecessary, in view of the settled law on the subject of an initial carrier's liability under the Carmack Amendment, to discuss appellant's point that a judgment against it alone cannot stand on such a state of the record.

The cause of action is in substance that the shippers' loss ensued from a breach of a provision in the order bill of lading requiring its surrender properly endorsed before delivery of the property. The affidavit of defense set up in substance that plaintiffs did not deliver the goods for transportation upon such condition, that the property was not lost by defendant's negligent conduct, and that plaintiffs had not complied with "the provisions of

the bill of lading." The last named defense refers to the requirement as to presenting a claim of loss.

The case was heard by the court without a jury. No evidence was introduced by defendant. No propositions of law were submitted to the court. The court denied defendant's motion for a directed verdict and entered the judgment upon its finding in plaintiffs' favor, from which this appeal is taken.

The only question before us is that raised by the motion for a directed verdict, namely, that of the sufficiency of the evidence. Only one question of fact is discussed, that raised by the last specified defense, namely, whether plaintiffs presented their claim to defendant at the point of origin within four months after delivery of the property as required by a provision in the bill of lading. The proof adduced on that subject was that the property was delivered May 6, 1912, and that within four months, namely "about September 1," - presumably in the year 1912, as may be inferred from the connecting circumstances in evidence, - plaintiffs wrote a letter to defendant's claim agent stating the circumstances of the loss and making the claim therefor, from which they never directly heard. The abstract shows no objection to the character of this testimony or motion to strike, nor was it rebutted. We think it constituted prima facie proof of compliance with said provision, which, however, was, under the form of the pleadings, a matter of defense.

The other questions argued are questions of law not raised by a motion for a directed verdict when not otherwise presented in the record. These questions are whether the provision for the surrender of the bill of lading is one for the benefit of the carrier only, and whether plaintiffs

waived the requirement of surrender by subsequently requesting payment of the consignee, on whose order the goods were delivered, and thereby ratified the act of delivery. As neither of these questions were in any way raised below they cannot be raised here for the first time. This is familiar law. The only question before us is whether the plaintiffs made a prima facie case on the issues of fact raised by the pleadings. We think they did.

AFFIRMED.

in denying his petition even had it stated a good defense to the action.

AFFIRMED.

235 - 22668

HARRY S. STEWART,
Plaintiff in Error,

vs.

EMILY H. JUNKIN,
Defendant in Error.

3686
Error to
Municipal Court
of Chicago.

209 I.A. 136

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Plaintiff in error, as assignee of a promissory note for \$10,000.00 dated July 26, 1910, payable to Emily S. Hutchinson on demand, with interest at the rate of 5½ per cent per annum, brought an action thereon against the maker, Emily H. Junkin, defendant below. The cause proceeded to a hearing before the court without a jury, at the conclusion of which the issues were found for the defendant and judgment for costs entered against plaintiff.

The statement of claim alleged the making of the said note; demand for payment and the refusal thereof by the defendant; and that plaintiff's claim with interest amounted to \$12,203.20, after allowing a credit of \$200.00 for interest paid August 1, 1911.

The affidavit of defense averred in substance; that there had been no valid delivery of the said note; that no consideration had been given therefor; that it was signed with the understanding that it was not to become a binding obligation; that the indorsement upon the said promissory note was a fiction and that defendant did not pay \$200 or any other sum, on or about August 1, 1911, either to the plaintiff or to the said Emily S. Hutchinson;

and that defendant was not indebted thereon to either the payee of the note or to the plaintiff.

It appeared from the evidence, that the said Emily S. Hutchinson, now deceased, who was the mother of the defendant, paid the sum of ten thousand dollars out of her own funds to the Orchestral Association of Chicago, at the request of the defendant, as a voluntary contribution made thereto by the latter, and that defendant signed the note in question shortly thereafter, to evidence her indebtedness to her mother, for the money so advanced.

The evidence further showed that defendant had supported her mother for a number of years prior to the latter's death; that she had given, at intervals of about six months, the sum of two thousand dollars for a number of years prior to the making of the note in question; that she continued these payments with the same regularity and in similar amounts (with rare exceptions) after the making of the said note. Defendant was permitted to testify, over the objection of plaintiff, that the latter amounts, i. e. those given after the making of the note, were given her mother in payment of the indebtedness evidenced by the said note, and it is now urged by plaintiff that the court erred in admitting such testimony, in the absence of an averment of payment in the affidavit of defense.

Rule 17 of the Municipal Court, as appears from the record, requires that the affidavit of defense must state specifically the nature of the defense relied upon. Defendant having predicated her defense upon a non-delivery, failure of consideration, and the alleged understanding that the said note was not to become a binding obligation, we think the foregoing testimony was inadmissible. We are re-



ferred by defendant to a line of decisions wherein it was held that payment may be proven under a general denial of indebtedness where the declaration or statement of claim avers payment of part of the debt and sets forth the balance due; and the contention is made, that because plaintiff's statement of claim averred the payment of \$200.00 on said note, defendant's alleged general denial of liability was sufficient to raise the issue of payment, even in the absence of a special averment of payment. But in the instant case, defendant, in addition to her general denial of liability, expressly denied having made the said payment of \$200.00 as set forth by plaintiff. This disclaimer was manifestly inconsistent with the theory of payment and served to emphasize the fact that defendant relied solely upon the defense of nonliability on the note in question for the reasons set forth in her affidavit of merits, and the so-called general denial of liability was in fact a mere conclusion based upon the specific defenses therein set forth. (Kadison v. Fortune Bros. Brg. Co., 163 Ill. App. 276.) In our opinion, the court committed reversible error in admitting evidence of payment.

The judgment will therefore be reversed and the cause remanded.

REVERSED AND REMANDED.

476 - 22910

GEORGE R. BOYD, Appellee,

vs.

DAVID C. SCHNELL, trading
as T. SCHNELL, Appellant.

APPEAL FROM

COUNTY COURT,

COOK COUNTY.

209 I.A. 187

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$629.18 and costs entered in favor of appellee, for the value of certain shipments of hay made by plaintiff to the defendant. Recovery was had upon the common counts. Defendant plead the general issue, and in his affidavit supporting his plea, averred that plaintiff had agreed to make the said shipments of hay on consignment; that he (defendant) was to sell the same; that the profits, if any, ensuing therefrom, were to be divided equally between them; that defendant sold the said hay and made full accounting therefor to the plaintiff.

It is contended by defendant that the court had no jurisdiction of the subject matter of this litigation, for the alleged reason that plaintiff and defendant were copartners in this enterprise; that the agreement between them provided for an equal division of the profits, although silent as to losses, and that an action at law would not lie to enforce an accounting between them as partners. Whether or not the parties were copartners in the profits contemplated from the project into which they had entered is immaterial to the issues here involved, for the obvious reason that plaintiff has not sought to recover any such

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profits, and because the evidence fairly tends to show that under the agreement in question plaintiff was to purchase the hay, advance the purchase price thereof, and draw on the defendant for the amounts advanced, and that his compensation for such services was to be paid out of the profits realized from the sale by the defendant of the hay so purchased. Clearly, therefore, defendant's position that the court was without jurisdiction is untenable.

The further point is made that the jury were incorrectly instructed. The instruction upon which stress is laid, purports to enumerate the prerequisites indispensable to a recovery by the plaintiff and also directs a verdict. It is contended by defendant that plaintiff could not recover without first proving that the hay purchased by him was of the quality and grade agreed upon between the parties, and that the instruction was fatally erroneous because it omitted this element. The record fails to disclose on whose behalf any of the instructions were given. In this state of the record error cannot be predicated upon the giving of the instruction in question. For ought we know it may have been given at the request of the defendant.

The court properly refused to give defendant's tendered instruction excluding the element of profits from the consideration of the jury, because there was no evidence introduced tending to shew profits, nor did plaintiff make any claim therefor.

Finally, it is complained that counsel for plaintiff committed improprieties in his closing argument to the jury. While this contention is not entirely groundless, yet in view of the fact that plaintiff's recovery was limited to moneys



actually advanced, we fail to see wherein defendant was harmed by the remarks complained of.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

479 - 22913

MARTIN DRIENSKY and ANNA
DRIENSKY,
Appellees,

vs.

MARY SKONIECZNY and TOMASZ
SKONIECZNY,
Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209 I.A. 138

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

The judgment herein complained of was entered in favor of appellees (plaintiffs below) against appellants in a suit for damages arising out of the refusal by appellants to consummate an exchange of real estate contemplated in a contract of sale entered into between the parties on May 2, 1914.

The contract in question, after describing the respective properties, set forth that plaintiffs' premises were subject to an "incumbrance for \$5,000 secured by first mortgage, and for \$2,000 secured by second mortgage payable monthly in installments of \$65 a month. * * * It further provided that each party should deposit a note for \$1,000 to secure the faithful performance thereof, and that in the event of breach by either party, the sum so named should be forfeited as liquidated damages.

Shortly after the execution of the said contract, defendants' attorney, at their request, made an examination of the title to plaintiffs' premises and prepared a written opinion thereof, wherein the objection was raised that the incumbrance of \$2,000 referred to in the contract of sale as being payable at the rate of \$65 per month consisted

of two sets of notes secured by two trust deeds payable as stated in the contract, but that the last note of each set became due and payable within ten months from the date of the contract.

The evidence shows that this objection was brought to the attention of plaintiffs, who immediately sought to have the time of payment of the balance extended to permit the entire incumbrances to be paid at the rate of \$65 per month as set forth in the contract of sale, but in vain, and that defendants thereupon refused to make the proposed exchange.

Defendants argue that the court erred in entering judgment for plaintiffs because the latter were not in a position to fulfill their contract, owing to the fact that the incumbrances on their property were not payable as represented in the said contract of sale. Plaintiffs, on the other hand, urge that defendants had repudiated their contract before they became aware of the fact that the \$2000 incumbrance was not payable as set forth in the contract, and refer us to the testimony of Anna Briensky who testified that she met the defendant Tomasz Skonieczny on the street one day and that he told her he would not take the property under any circumstances. This was flatly denied by the said defendant. After pointing out that such statement by defendant Tomasz Skonieczny was tantamount to a repudiation of the contract, giving plaintiffs a right of action before the time of performance of the contract on their part plaintiffs urge that it likewise became unnecessary on their part to tender performance to the defendants who had already repudiated the contract. While it is true that a tender of performance by an innocent party to a contract may in some

situations be excused, yet this presupposes that the innocent party is himself in a position to fulfill his part of the contract. In the case at bar plaintiffs admit their inability to obtain an extension of time on the incumbrances referred to. They are therefore unable to fulfill their agreement and consequently their position is no better than that of the defendants, irrespective of any previous conversations alleged to have been had with any of the defendants. (Harber Bros. Co. v. Moffatt Cycle Co., 151 Ill. 84.) Obviously, the plaintiffs were not entitled to a recovery.

In this view of the case it is unnecessary to consider the other question raised by defendants, viz., whether or not the sum stipulated as liquidated damages was in fact a penalty.

Accordingly the judgment will be reversed.

REVERSED.

ANTON J. CERMAK, Bailiff of
the Municipal Court of Chicago,
for use of Samuel B. Goldberg,
Appellee,

vs.

ANNA H. SCHWENDEL,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 139

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below), brought suit and recovered judgment against appellant (defendant below), in an action of debt, brought on a stay of execution bond. By this appeal defendant, who was the surety on the said bond, seeks a reversal of the judgment, on the grounds; (1) that plaintiff's statement of claim does not set up a good cause of action, and (2) that section 23 of the Municipal Court Act, pursuant to which the said bond was given, is unconstitutional and that hence the bond was void. Such was substantially the defense made in the trial court.

Plaintiff's statement of claim alleged the procuring of a judgment in the Municipal Court, against Fred Slaughter et al., after which the said Slaughter sued out a writ of error to review the same; that in order to stay execution on the said judgment pending the decision of the Appellate Court, the said Slaughter as principal, and Anna H. Schwendel (defendant herein) as surety, executed a stay of execution bond, which provided that if the said Slaughter should prosecute the said writ of error with effect and moreover pay the amount of the judgment, costs, interest and damages rendered and to be rendered against the said Slaughter,

should the judgment be affirmed by the Appellate Court, then the bond to be void, otherwise to remain in full force and virtue. Then followed the averment that the said writ of error was duly docketed in the Appellate Court and that it was duly called in the regular course of procedure but that for failure by the said Slaughter to file a record from the trial court, the said writ of error was dismissed for want of prosecution; wherefore the bond became forfeited, etc.

We think that under the liberal construction given to the Municipal Court Act the foregoing recites a cause of action with sufficient particularity to apprise the defendant of the nature of plaintiff's claim. There is no contention by defendant that the judgment has been paid, and if such was the fact, it should have been set forth by way of defense.

Although section 23 of the Municipal Court Act, pursuant to which the bond in question was furnished, has been held unconstitutional, (Israelstan v. U. S. Casualty Co., 272 Ill. 161) nevertheless such fact does not affect defendant's liability in the case at bar. There was a legal consideration for the giving of the bond, viz., the stay of execution pending the decision of the Appellate Court, and the bond having fully served its purpose, and defendant having obtained all the benefits incident thereto, she is now estopped to deny its validity. Mix v. People, 86 Ill. 329; Yases v. Royal Indemnity Co., 276 Ill. 177.

We are of the further opinion that this appeal is vexatious and that it was prosecuted merely for delay.

Accordingly the judgment will be affirmed with ten per cent statutory damages.

AFFIRMED WITH STATUTORY DAMAGES.

489 - 22923

CHARLES SHEAHAN,
Appellee,

vs.

HADFIELD ICE CREAM COMPANY,
a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 131

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee (plaintiff below), recovered judgment against appellant for \$575.00, as the balance due for services rendered.

Plaintiff's testimony was to the effect that in the course of a conversation with Abram Hadfield, president of the defendant company, with whom he had previously worked for a number of years with another ice cream manufacturing company, he was asked if he would care to make a change of employment and work for the defendant, to which he replied in the affirmative; that in discussing the question of salary, plaintiff stated he was then receiving \$2,300.00 per annum and that he would not consider a change for less than that amount; that it was then agreed he should work for the defendant company, to manage its contemplated "west branch," at a salary of \$2,400.00 per year; that the said Hadfield informed plaintiff that he was the sole owner of the business; that after the arrangement was made, plaintiff abandoned his other employment to work for the defendant company; that shortly thereafter, and before plaintiff had drawn his first salary, the said Hadfield informed him that his nephew, who was also connected with the defendant company,

should not know how much money plaintiff was drawing for his services, and stated, "I will give you \$25 every week and at the end of the month I will give you a check for the balance for a hundred and that * * * will practically make \$2,400.00;" that he (plaintiff) assented thereto, with the observation that it made no difference where the money came from, just so he received it; that he received the stipulated salary in the manner outlined, until September, 1915; that defendant was in arrears \$75.00 on the September salary, and \$100 each for the months of October, November and December, 1915, and January and February 1916. The said Hadfield, in his testimony admitted having employed plaintiff on behalf of the defendant company, but stated that the company was to pay him \$25.00 per week, and that he personally was to pay him a bonus of \$100 per month provided plaintiff succeeded in selling a certain amount of ice cream within a given time.

It is urged by defendant on this appeal, that the said Hadfield acted in his individual capacity, and not on behalf of the defendant company, in agreeing to pay plaintiff the additional \$100 per month. The evidence on this issue was rather conflicting, but we cannot say that the finding of the jury in favor of the plaintiff is clearly and manifestly against the preponderance thereof.

It is pointed out by counsel for defendant, that the said Hadfield, even though he was president of the defendant company, had no authority to make any secret arrangement on behalf of the company. What interest, if any, the nephew of the said Hadfield had in the defendant company does not appear from the evidence. Hadfield having admitted that the original contract of employment with plaintiff was

on behalf of the defendant company, it is difficult to perceive, and the evidence fails to reveal why the said Hadfield should personally undertake to pay plaintiff this additional \$100 per month by way of a bonus for his services rendered to the defendant company. At any rate, whether the salary was to be paid by the said Hadfield personally or by the defendant company was a question of fact for the jury. This they have decided adversely to the contention of the defendant.

Complaint is also made of the remarks of plaintiff's counsel in his argument to the jury. From an examination of the record, we are of the opinion that this alleged error, if any, is not of sufficient gravity to warrant a reversal of the judgment.

Finding no reversible error in the record, the judgment will be affirmed.

AFFIRMED.

MICHAEL MARTIN,
Appellee,

vs.

W. P. ROONEY COMPANY,
a corporation,
Appellant,
et al.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209 I.A. 132

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

But two points are presented for review upon this appeal, viz.; (1) whether a judgment can be properly rendered against one, or less than all, of several defendants sued jointly in an action ex contractu, where service was had on only those against whom judgment was taken and (2) whether the court abused its discretion in denying defendants' motion to set aside the judgment herein complained of.

The first question is answered in the affirmative by sec. 14 of the Practice act, ch. 110 R. S. of Illinois, which expressly provides that in an action ex contractu, if a summons or capias is served on one or more, but not all, of the defendants, plaintiff may proceed to trial and judgment against defendant or defendants on whom process is served, and the plaintiff may at any time afterwards have summons in the nature of a scire facias against the defendant not served with process, to make him a party to such judgment. See also: O'Donnell et al. v. Turnes, 201 Ill. App. 481, and Sherburne v. Hyde, 185 Ill. 580.

The affidavit filed in support of defendants' motion to set aside the said judgment, denied that there was an account stated between plaintiff and defendants,

but there is no allegation that the amount claimed is not due or that there is any defense to the action. The court therefore properly denied the motion to vacate the judgment.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

497 - 22931

NICOLOS GROTZ,
Appellee,

vs.

JOHN ENGEL,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

209 I.A. 193

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit based upon a written guaranty whereby appellant (defendant below) guaranteed the payment of rent and the performance of all covenants contained in a lease entered into by and between appellee (plaintiff below) and one August Turnes. By direction of the court, the jury returned a verdict for the plaintiff, and from the judgment entered thereon defendant has prosecuted this appeal.

It is urged by defendant that the court erred in directing a verdict for the plaintiff. Underlying this contention is the theory of defendant, that because the contract of guaranty sued upon was entered into after the execution of the said lease, it was invalid for want of consideration.

Plaintiff testified that defendant brought Turnes to his (plaintiff's) home for the purpose of renting plaintiff's premises, stating that he (Turnes) would make a good tenant, and that defendant would guarantee payment of the rent if Turnes leased the premises; that some time was spent looking over the premises and discussing the question of leasing the same; that subsequently the said lease was

executed and defendant thereafter became guarantor thereon. The testimony of the defendant was substantially to the same effect.

From the facts hereinabove set forth, it will be seen that the promise by defendant to guarantee payment of the rent was the inducing cause upon the faith of which plaintiff made the lease with the said Turnes. Where the guaranty, although collateral, is connected with and forms the inducement for the execution of the principal contract or is the result of a previous promise, upon the faith of which the principal contract was made, the guaranty requires no new and independent consideration to give it force, because it is a part of the original transaction and of the consideration upon which the principal contract was made. (20 Cyc. 1416 and cases cited.) It is clear, therefore, that the contention of the defendant that the contract of guaranty was without consideration is untenable.

Defendant also complains that the court misconstrued the terms of the said lease, and that there was a fatal variance between the contract alleged in the declaration and the lease offered in evidence. As to the latter contention, we deem it sufficient to say that it is without merit.

The lease, after describing the premises demised, set forth that the lessee was "also to have room in the barn for two horses, for the term of four years less two months and one-half, to commence on the 15th day of October A. D. 1912, and to end on the first day of August, A. D. 1916." It provided further for the payment of rent as follows:

"And the said party of the second part hereby covenants and agrees to pay unto the said party of the first part, the four years rent or sum of \$5,400.00, payable December 15, 1912 - \$300, and thereafter paying \$300 every three months for the first year's rent, being \$1,200.00 all told; and \$350 every three months thereafter, making a total sum of \$1,400.00 per year, or

"\$4,200.00 for the last three years."

The court construed this clause to mean, that for the first nine and one-half months the rental to be paid was \$1,200.00, and that for the last three years it was to be \$1,400.00 per year. Defendant argues, on the other hand, that the \$1,200.00 referred to should have been for the first year, i. e. twelve months, and that the \$1,400.00 annual rental should have been for the remaining two years, nine and one-half months, instead of three years as stated in the lease - in other words, that the intention was, not to pay four years' rental, as recited in the lease, but to pay rent for three years, nine and one-half months, on the basis of \$5,400.00 for four years. In our opinion, the intention of the parties, as gathered from the language employed in the lease, was that the sum of \$1,200.00 therein mentioned should cover the first period of the lease, i. e. the first nine and one-half months, and the rental thereafter was to be \$1,400.00 per year, for the remaining three years. This is further evidenced by the language, "or \$4,200.00 for the last three years," and the fact that the lessee expressly agreed to pay the four years' rent, meaning thereby, the period beginning October 15, 1912, and ending August 1, 1916. As we view this lease, the only reasonable construction that can be placed thereon is, that the said Turnes thereby agreed to pay \$5,400.00 for the rental of the premises in question, for the term of three years, nine and one-half months, in instalments as therein set forth. We conclude, therefore, that the trial court properly construed the lease in question.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

508 - 22942

HENRY A. TODD,
Appellee,

vs.

McKENZIE CLELAND,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 194

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellee brought suit against appellant on a promissory note. Appellant filed a claim of set-off for \$395.00 and interest for legal services alleged to have been rendered. The jury, by a special finding, fixed the reasonable value of said services at \$224.00 and returned a verdict for appellee for the balance due on said note, plus the interest.

It is contended by the appellant that the special finding of the jury, fixing the value of appellant's services at \$224.00, is unsupported by the evidence. Several witnesses testified on behalf of both parties as to the reasonable value of these services, and their estimates varied greatly, ranging all the way from \$26.00 to \$500.00. One witness testified on direct examination that the said services were worth \$400.00, but on cross examination he reduced his estimate to \$200.00. None of the witnesses attempted to fix the value of these services to a mathematical certainty, but at most their testimony was merely an approximation of the value thereof. In view of the various estimates given by the witnesses of the approximate value of appellant's services, we cannot say that the special finding of the jury

fixing the value thereof at the sum of \$224.00 is unsupported by the evidence.

It is also urged by appellant that the court erred in excluding part of a letter written by him to the appellee in answer to a written demand by the latter for payment of the note sued upon. The part excluded consisted of appellant's self-serving statements and charges reflecting upon the character of appellee. They had no bearing whatever upon the issues in the case and were therefore properly excluded by the court.

Appellant also complains that the record of the proceedings before the justice of the peace, in which he represented appellee in a suit brought by the latter for the recovery of \$52.00, was erroneously excluded. This was the action in which appellant rendered the legal services hereinabove referred to. The apparent object of introducing this evidence was to corroborate appellant's testimony as to the number of continuances taken in the said cause before the justice of the peace. Appellant's testimony on this point was not positively denied by any of appellee's witnesses. While such transcript was admissible, yet we are of the opinion that its exclusion under the circumstances did not constitute reversible error.

Other points have been raised, but we consider it unnecessary to pass upon them as we believe they are without merit. Suffice it to say that from a careful examination of the record, we are of the opinion that appellant has been generously rewarded for his services in the litigation hereinabove referred to, which involved the collection of \$52.00. Accordingly the judgment will be affirmed.

AFFIRMED.

MR. JUSTICE MATCHETT DISSENTS.

MICHAEL J. COLLINS et al. as
and comprising the BOARD OF
EDUCATION OF THE CITY OF
CHICAGO,

Appellants,

vs.

DANIEL F. CRILLY,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

209 I.A. 209

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Inasmuch as the issues in this case are identical with those presented in Collins et al. v. McVicker Theatre Company, general number 22582, filed July 19, 1917, (except the names of the parties and the parcels of land involved) our opinion in the latter case disposes fully of the points here presented.

The point is also made that the court should have granted appellants' motion to require appellees to pay into court the amounts admitted by their respective answers to be due under the appraisements as made.

Appellees tendered to the appellants the respective amounts of rent due as fixed by the appraisements, which the appellants have repeatedly refused to accept. The object of appellants' bill of complaint was to modify or set aside the appraisements in question and not to recover the rents due thereunder. We are therefore clearly of the opinion that the court properly denied appellants' said motion. Green v. Duvergey, 146 Cal. 379.

Accordingly the decree will be affirmed.

AFFIRMED.

MICHAEL J. COLLINS et al. as
and comprising the BOARD OF
EDUCATION OF THE CITY OF
CHICAGO,

Appellants,

vs.

CHICAGO TITLE AND TRUST COMPANY
et al.,

Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

209 I.A. 211

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Inasmuch as the issues in this case are identical with those presented in Collins et al. v. McVicker Theatre Company, general number 22582, filed July 19, 1917, (except the names of the parties and the parcels of land involved) our opinion in the latter case disposes fully of the points here presented.

The point is also made that the court should have granted appellants' motion to require appellees to pay into court the amounts admitted by their respective answers to be due under the appraisements as made.

Appellees tendered to the appellants the respective amounts of rent due as fixed by the appraisements, which the appellants have repeatedly refused to accept. The object of appellants' bill of complaint was to modify or set aside the appraisements in question and not to recover the rents due thereunder. We are therefore clearly of the opinion that the court properly denied appellants' said motion. Green v. Duvergey, 146 Cal. 379.

Accordingly the decree will be affirmed.

AFFIRMED.

MICHAEL J. COLLINS et al.
as and comprising the BOARD
OF EDUCATION OF THE CITY OF
CHICAGO,
Appellants,

vs.

MACEY SECURITIES CO.,
Appellee.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

209 I.A. 212

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Inasmuch as the issues here presented are identical with those presented in Collins et al. v. McVicker Theatre Company, general number 22582, filed July 19, 1917, (except the names of the parties and the parcels of land involved) our opinion in the latter case disposes fully of the points now before us.

The point is also made that the court should have granted appellants' motion to require appellees to pay into court the amounts admitted by their respective answers to be due under the appraisements as made.

Appellees tendered to the appellants the respective amounts of rent due as fixed by the appraisements, which the appellants have repeatedly refused to accept. The object of appellants' bill of complaint was to modify or set aside the appraisements in question and not to recover the rents due thereunder. We are therefore clearly of the opinion that the court properly denied appellants' said motion. Green v. Duvergey, 146 Cal. 379.

Accordingly the decree will be affirmed.

AFFIRMED.

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336 - 22770

HILDUR M. HALLIN et al.,
Appellees,

vs.

GEORGE E. PENNEY et al.,
Appellants.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

487 - 22921

HILDUR M. HALLIN et al.,
Defendants in Error,

vs.

GEORGE E. PENNEY et al.,
Plaintiffs in Error.

ERROR TO CIRCUIT COURT,
COOK COUNTY.

209 I.A. 230

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Both an appeal and writ of error in this case which have been consolidated, must be disposed of on the same grounds. A bill in chancery was brought by the heirs at law of Ernest Hallin, deceased, to contest the validity of an instrument in writing purporting to be the last will and testament of said Ernest Hallin, charging that the probate of said will was without notice to complainants and denied that the said deceased had ever signed and executed said instrument and further alleged that he was not of sound mind and memory at the time of its alleged execution.

The answer denied said allegations and upon trial the court ordered two issues of fact to be made and submitted to the jury as follows: First, whether the writing purporting to be the last will and testament of Ernest Hallin, deceased, was such last will and testament or not; second, whether or not said Hallin was of sound mind and memory at the time of the execution of said instrument. The jury answered "No" to both of said issues, and on the same day the court entered a decree granting the relief prayed for.

No evidence was offered in behalf of the defendants, nor did anyone appear in behalf of said defendants at the trial.

1. The first part of the paper is devoted to the study of the properties of the function $f(x)$ defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$

2. It is shown that the function $f(x)$ is increasing and concave down on the interval $(-\infty, \infty)$.

$$f(x) = \arctan x$$

3. The function $f(x)$ is continuous on the interval $(-\infty, \infty)$ and has the property that

$$\lim_{x \rightarrow \pm\infty} f(x) = \pm \frac{\pi}{2}$$

4. The function $f(x)$ is differentiable on the interval $(-\infty, \infty)$ and its derivative is given by the formula

$$f'(x) = \frac{1}{1+x^2}$$

5. The function $f(x)$ is a solution of the differential equation

$$y' = \frac{1}{1+y^2}$$

6. The function $f(x)$ is a solution of the initial value problem

$$y' = \frac{1}{1+y^2}, \quad y(0) = 0$$

7. The function $f(x)$ is a solution of the differential equation

$$y' = \frac{1}{1+y^2}$$

8. The function $f(x)$ is a solution of the initial value problem

$$y' = \frac{1}{1+y^2}, \quad y(0) = 0$$

9. The function $f(x)$ is a solution of the differential equation

$$y' = \frac{1}{1+y^2}$$

10. The function $f(x)$ is a solution of the initial value problem

$$y' = \frac{1}{1+y^2}, \quad y(0) = 0$$

11. The function $f(x)$ is a solution of the differential equation

$$y' = \frac{1}{1+y^2}$$

12. The function $f(x)$ is a solution of the initial value problem

$$y' = \frac{1}{1+y^2}, \quad y(0) = 0$$

On June 9, 1916, at the same term, plaintiffs in error gave notice and presented a motion supported by affidavits filed, asking that the verdict of the jury and the decree entered thereon be vacated and set aside. Said motion was from time to time continued until July 7, 1916, at which time said motion was overruled and it is here assigned for error that the court denied and overruled the said motion. Further, error is assigned that the court upon the hearing of said motion considered counter affidavits upon the merits of the case in opposition to said motion.

There is no controversy as to the rule of law which must control in matters of this kind. As was held in the case of The Gilchrist Trans. Co. v. Northern Grain Co., 204 Ill. 510, "so far as these counter-affidavits related to the merits of the controversy the court erred in hearing and considering them." This error alone, however, will not reverse.

It is also the law as was stated by the Supreme Court in the case of Mathias Crossman v. John Schlieben, 90 Ill. 537, that "In applications to set aside judgments entered by default or entered in ex parte proceedings, affidavits in support of such applications are to be construed most strongly against the party making the application."

It is also the law as stated in Dunlap v. Gregory et al., 14 Ill. App. 601, "When a judgment which is plainly unjust has been rendered against a party by default, if a reasonable excuse is shown for not having made a defense, and the party against whom the judgment is rendered exercises reasonable and ordinary diligence in moving to set it aside, it is the duty of the court to exercise its discretion by granting the motion, especially if it be made at the same term at which the judgment is rendered."

A motion of this kind is, however, always addressed to the discretion of the trial judge and an appellate court will never interfere with that discretion unless it has been abused.

Applying these rules to the facts in the case before us, we are of the opinion that the affidavits filed in support of the motion failed to show due and proper diligence on behalf of the solicitor for appellants and plaintiffs in error. From his affidavit it appears that prior to the trial while absent from Chicago he received a severe injury, but returned to Chicago May 21st, 1916; that the case was actually tried ten days after his arrival. The affidavit states that he was necessarily confined to his home by reason of the injury but it does not show that he was unable to inquire in regard to the case, or to secure someone to present to the court a motion for postponement of it.

It is significant that in no one of the affidavits in support of the motion is it stated that the affiant was unaware of the fact that the case was on trial, or called for trial. The affidavit of the solicitor shows that he had an office associate on whom he depended to try this case in his absence. There is no affidavit from said office associate, nor any assertion of fact in the affidavit of the solicitor for plaintiffs in error that this associate was not informed of the time when the case would be reached for trial. Due diligence on his part in the absence of any facts tending to show that the case was not called in regular and due course, required him to watch the court's call, or have some competent person act for him. There is no adequate showing of such diligence. Even after he had notice of the decree he waited nine days before making his motion to vacate it.

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We cannot hold on this showing that the discretion of the trial court was abused and the judgment will, therefore, be affirmed.

AFFIRMED.

RITA DOROTHY O'CONNELL, a
minor, by her next friend,
MARY O'CONNELL,

Appellee,

vs.

WEST SIDE HOSPITAL OF
CHICAGO, a corporation, and
RICHARD J. O'CONNELL,
Appellants.

APPEAL FROM

SUPERIOR COURT OF

COOK COUNTY.

20914 283

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for plaintiff entered by the Superior Court of Cook County in an action on the case brought by Rita Dorothy O'Connell, a minor, against the West Side Hospital of Chicago and Richard J. O'Connell.

The declaration in two counts set up the employment of appellant O'Connell as a physician and surgeon and the hospital to furnish nurses, etc. to care for the plaintiff's mother during her confinement, at which time appellee, plaintiff below, was born, and charged the negligent performance of their respective duties by each, by means whereof the eyes of plaintiff became infected, which infection appellant O'Connell as physician and surgeon negligently allowed to spread, etc.

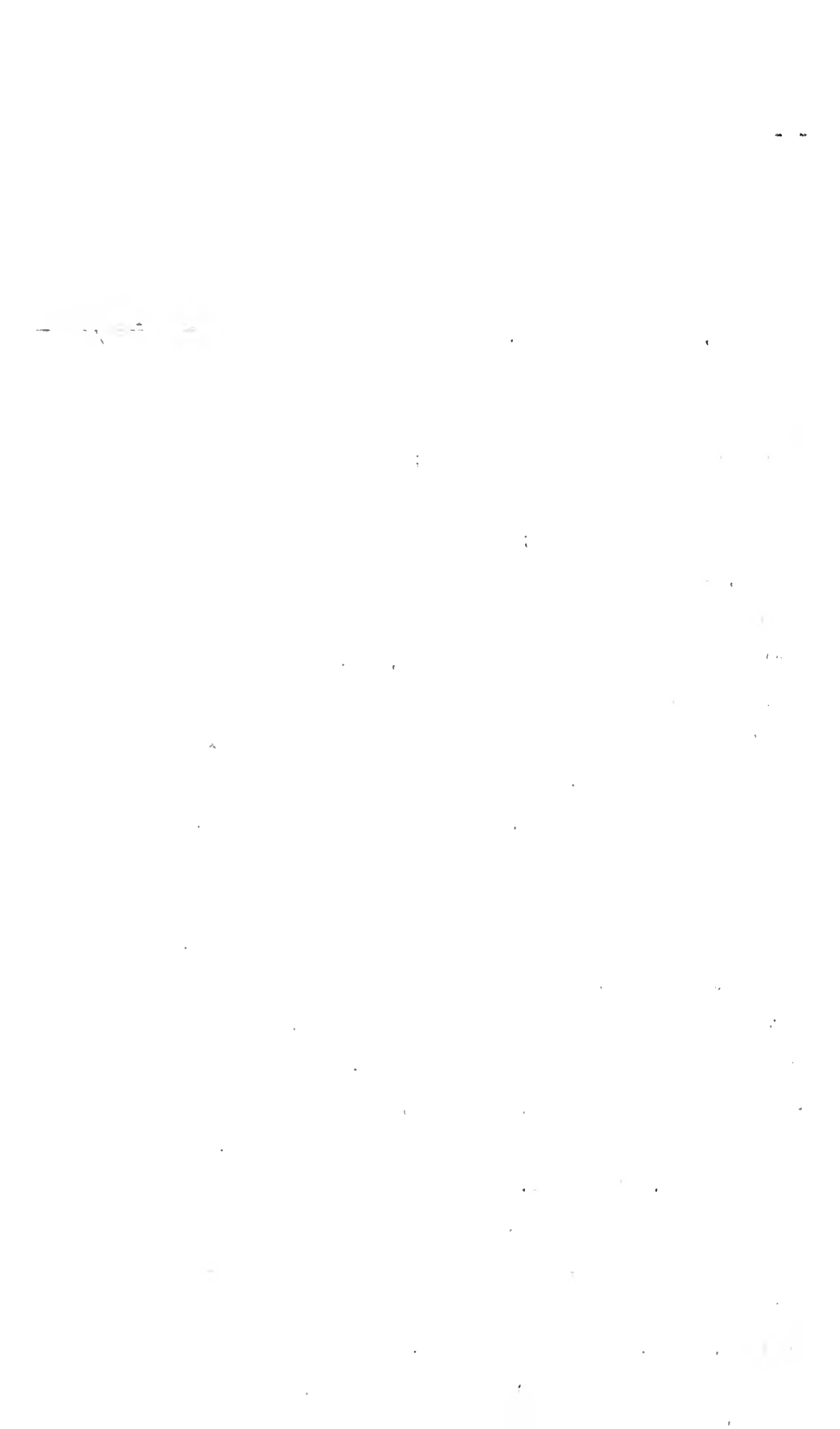
At the close of the evidence for the plaintiff, appellant O'Connell rested his case and asked for an instruction in his behalf, which was denied and thereupon he declined to proceed further and has assigned error here on the court's refusal to so instruct. We will first consider this alleged error.



It was proved in behalf of plaintiff that she was born at the defendant hospital on the morning of the 4th day of April, 1913; that Dr. O'Connell was employed ^{and did attend} ~~to attend~~ the mother of plaintiff on that occasion. That the plaintiff remained in said hospital until April 14th, when she was removed to the home of her parents; that within a few minutes after plaintiff's birth she was taken from the mother's presence to the nursery; that after attending to plaintiff's mother, the doctor went over to the nursery; that he called each day thereafter and saw the plaintiff and that at about 2 o'clock on the 12th day of April, Dr. O'Connell showed the plaintiff to witness Lillian Cornwall and asked her if she didn't think it was a healthy and nice-looking child to which she replied she did. This witness further stated, "I looked at the baby at that time, and it looked nice to me."

The mother of plaintiff testified that on the same day her husband came in while the baby was nursing (the father's testimony fixes the time at 4 o'clock P. M. of the same afternoon) and called the mother's attention to a slight redness on the right lid of the baby's eye. She says "There was a slight redness on the right lid. That is all I noticed. I did not think anything about it, just a little red spot, and I simply thought it was a cold she had taken. The next day I saw Dr. O'Connell. It was in the morning, I think, that is Saturday morning. He stood at the bedside and I said "While you are here, go in and see my baby's eyes. Frank (meaning her husband) has discovered something." Dr. O'Connell replied, "I will certainly do so."

About 4 o'clock on the same day, according to the father's testimony, Dr. O'Connell saw the father of plaintiff at the home of plaintiff's parents, called him aside and



stated in a serious manner that there was some trouble with one of the baby's eyes; that he thought it was a serious thing and ought to have immediate attention. The father replied that he hoped it was receiving it and Dr. O'Connell said "We will have to get the attention of an oculist"; that the father replied, "Better start at it".

The father made an appointment with Dr. O'Connell for half-past seven at the hospital that evening at which time the father asked what was the character of the infection and the doctor stated that it was a gonorrheal infection. The father replied that he did not quite understand how that could be and the doctor answered, "Well, he said, the fact remains that it is", and I said, "How do you know it is?" and he said, "I had a culture taken." I said, "When did you have this culture taken?" and he said "This afternoon." I said, "The result of it was, it was gonorrheal?" and he said "Yes and tried to drive it home too."

The father and the doctor then made efforts to get an expert. They found that one of the doctors called was in Europe. The father then called a doctor who was found not to be a specialist and in about an hour and a half Dr. O'Connell succeeded in getting in touch with Dr. Barr who came to the hospital in response to a telephone call, made an examination of the plaintiff's eyes in the presence of her father, Dr. O'Connell and the nurse and prescribed.

The next day plaintiff was taken home where she was thereafter treated by Dr. Barr. While under Dr. Barr's care the infection spread to the other eye and for sometime plaintiff was almost blind. Both eyes are permanently injured.

The father and mother both testified that neither

of them had ever been afflicted with a disease known as gonorrhea, nor any similar disease. Several children were born to them prior to the birth of plaintiff, none of whom were infected in this or in any other way.

Experts called by plaintiff agreed that the plaintiff suffered from gonorrheal ophthalmia or ophthalmia neonatorum. These experts further testified at length as to the nature and character of the disease and the proper treatment for it, but their evidence fails to show that Dr. O'Connell was unskilful or negligent in his treatment of plaintiff in any way, or that anything done or left undone by him was the original cause of plaintiff's disease, or the cause of the disease spreading.

We have stated the evidence appearing in the record against Dr. O'Connell at the time he made his motion for a directed verdict. Other evidence introduced after Dr. O'Connell withdrew from the case has been called to our attention, but we cannot consider such evidence in reviewing this motion for a directed verdict. Condon v. Schoenfeld, 214 Ill. 226.

The rule of law to be applied is well settled. If the court is of the opinion that in case a verdict is returned for the plaintiff, it must be set aside for want of any evidence to sustain it, the instruction for the defendant should be given. Libby, McNeill & Libby v. Cook, 222 Ill. 206.

It is also the law that the question as to whether a physician has treated a case skilfully is a question of science which must be determined not by lay evidence, but by the testimony of skilful surgeons and physicians. Moline v. Christie, 180 Ill. App. 334; Miller v. Toles, 55 L. R. A. N. S. 595.

The evidence for plaintiff tended to show, and

that was plaintiff's theory of the case, that the infection which caused the unfortunate injury to her eyes arose subsequent to her birth. It also showed that when this infection was discovered, Dr. O'Connell advised, and the parents agreed, that an expert should at once be called to take charge of the case. This was done. The expert evidence submitted in behalf of the plaintiff was to the effect that this was the proper and best practice for a general practitioner such as the evidence showed Dr. O'Connell to be. The evidence given in behalf of plaintiff was, therefore, insufficient to go to the jury as against Dr. O'Connell and his motion for a directed verdict should have been granted. Moline v. Christie, 180 Ill. App. 334.

The judgment is against both defendants, but being erroneous as to one, must be reversed as to both and the case remanded.

REVERSED AND REMANDED.

IN THE MATTER OF THE LAST
WILL AND TESTAMENT OF HENRY
RAHN, Deceased.

FRAUEN VEREIN DES DEUTSCHEN
ALTENHEIM.

)
APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

209 I.A. 234

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from the order of the Circuit Court of Cook County admitting to probate the will of one Henry Rahn.

The cause had been placed on the short cause calendar and when it was reached the court granted a motion to strike from the short cause calendar and entered an order advancing the cause for an immediate hearing upon the regular calendar. The court then over the objection of contestant proceeded to take the testimony. A part of the testimony offered was that of the witness Joseph H. Whitfield, and prior to the reading of his deposition the contestant made a motion to suppress it on the ground that the witness had refused to answer material questions upon cross examination. This motion was denied. Further evidence for the proponents of the will was heard. The contestant offered no evidence and the court thereupon entered an order admitting the will to probate.

Appellant assigns error, - 1st, in that the court advanced the cause for hearing; 2nd, in that the court denied appellant's motion to suppress the deposition of Whitfield; and, 3rd, in that the court ordered the will to probate upon evidence which failed to establish a prima facie case.

The advancement of a cause for hearing is a matter which rests in the sound discretion of the trial court and this court will not interfere with the exercise of that discretion unless it appears that it has resulted in manifest injustice. Richardson Fueling Company v. Seymour, 235 Ill. 319. There is nothing presented in this record to show any injustice was done. The policy of the law favors the speedy hearing of matters connected with the settlement of the estate of deceased persons and in the absence of an affirmative showing of injury by the party complaining, the fact that the litigation has been speedily heard and disposed of, does not constitute error.

As to the motion to suppress the deposition of the witness Whitfield, it appears from the record that he refused to answer certain questions asked him during a quite extended cross examination. He had answered that prior to giving his testimony he had concealed his whereabouts; that he had not wished to testify, but had upon reflection thought it his duty to do so; that he had about the same time received compensation for his time and expenses from the proponents of the will; that his reason for concealing himself when first sought was that he did not wish to be bothered about these things; that it was a fact for the past two years he had kept his whereabouts secret from the people of Chicago, but he refused to answer whether it was simply because of this matter that he had concealed himself, or whether there was any reason why he should evade a question as to his whereabouts, or whether he had instructed his wife not to give his whereabouts and refused to tell why he refused to answer or tell under what circumstances he left the city of Chicago.

The extent to which cross examination of this kind may be indulged is also very much in the discretion of the trial court. People v. Strauch, 247 Ill. 230. When the witness refused to answer further he had already been questioned at length along the same general line and these questions which he refused to answer went only to the matter of his credibility and not to the merits of the case. Here again we are not able to say that the trial court abused its discretion.

As to the sufficiency of the evidence, we are of the opinion that the proponents made out a prima facie case. Heirs of Critz v. Pierce, 106 Ill. 167.

No evidence was offered in behalf of the contestant, although the court offered to give him time to procure such evidence if he desired so to do. There yet remained to him his remedy to contest the will under the provisions of the statute in which proceedings the evidence which might properly be introduced in his behalf would cover a much wider field than was permissible in the proceeding from which this appeal is taken. Stuke v. Glaser, 223 Ill. 318.

The judgment of the trial court will be affirmed.

AFFIRMED.

462 - 22896

WILLIAM H. BRADLEY,
Appellee.

vs.

JOSEPH D. HUBBARD,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

209 I.A. 236

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Joseph D. Hubbard, defendant below, from a judgment of the Superior Court of Cook County entered upon the verdict of a jury in favor of plaintiff below, appellee here, William H. Bradley, in an action in assumpsit.

Prior to August 1st, 1912, appellee Bradley opened negotiations with Hubbard for the purpose of getting him to finance the Auto Refrigeration Company, a new corporation, the principal assets of which consisted of a license of supposed value under certain patents owned by the Auto Vacuum Refrigeration Company, a corporation of New York. Royalties were shortly to become due under the terms of the license and if not paid the license would be forfeited.

On August 1, 1912, a contract was entered into between Hubbard and the Auto Refrigeration Company, by the third article of which Hubbard agreed to advance on that date the sum of \$12,000 in cash and by August 14th the further sum of \$88,000 either in cash or negotiable paper. By the eighth article it was agreed, however, that if Hubbard did not provide the further funds according to the terms of section three, then the corporation agreed to repay the

\$12,000 advanced by Hubbard within four months from that date. A part of this \$12,000 consisted of Bradley's check for \$10,000 to Hubbard's order delivered by Bradley to Hubbard and by Hubbard to the Auto Refrigeration Company.

Bradley claimed that his check represented a temporary loan to Hubbard to enable Hubbard to make the first payment under the terms of this agreement, while Hubbard claimed that Bradley, being interested as well as he, had advanced this money upon the understanding that it was to be repaid in full only in case of the repayment by the Auto Refrigeration Company of the \$12,000 advanced, and that if not so repaid, Hubbard was to reimburse Bradley only to the extent of \$4,000, the intention being that in such case Hubbard and Bradley would each contribute one-half of the \$12,000 advanced.

Hubbard did not furnish the additional money or paper as provided in article three and elected to ask repayment of the \$12,000 advanced. Bradley claiming his \$10,000 check was a loan, demanded repayment thereof by Hubbard who denied liability except as to \$4000 of the amount.

About August 27th, Bradley told Hubbard he did not wish litigation and later Hubbard handed to Bradley a memorandum of agreement as a basis for settlement. This memorandum is in evidence as plaintiff's exhibit 2. It recites as facts that Hubbard had entered into his contract with the Auto Refrigeration Company at the request of Bradley; that Bradley had paid \$10,000 as a part of the \$12,000 to be advanced under the contract and that Hubbard had thereafter volunteered to reimburse Bradley to the extent of \$4000 provided the \$12,000 was not repaid.

This memorandum was by plaintiff taken to the office of his attorney who prepared a reply which was delivered to Hubbard on August 29th, and which is plaintiff's exhibit 4. Therein he said, - " * * * * * You did not enter into that agreement at my request. I brought the deal to you for you to consider and if you wanted to take it up you were to decide. You were on one side, I was on the other. You looked into the matter and decided to take the deal when it was framed to meet your views, but you said that while you had the people to go into it you did not have the necessary cash to spare for the immediate first payment. * * * * * ".

The exhibit consisting of several pages of type written matter, is too long to set forth in full in this opinion. It is sufficient to say that it discussed with detail the point in controversy. When exhibit 2 was offered by plaintiff, defendant objected stating that the apparent purpose of plaintiff was to make admissible his own subsequent self-serving reply. This objection was overruled. When plaintiff's exhibit 4 was offered, the defendant again objected but the court held, "Any papers that one handed to the other is admissible in evidence."

Appellee argues "if exhibit 2 was admissible, the answer to it, of course, was admissible because it called for an answer and if not answered it would have been insisted on as an implied admission." We do not so understand the law. A failure to answer plaintiff's exhibit 2 would not of itself have made such exhibit admissible in behalf of the defendant. The mere fact that a letter received is not answered is not evidence of acquiescence by the party to whom it is sent in the fact stated in the letter. City of Chicago v. McKechney, 205 Ill. 372. Neither was plaintiff's exhibit 4 admissible

simply because it was a reply by plaintiff to exhibit 2. If the defendant had put in evidence some prior utterance of plaintiff which the subsequent letter of the plaintiff was useful or necessary to explain, or if the communication had passed between the parties under circumstances which made it a part of the res gestae, or if it had been in the nature of a notice or demand and been limited when offered to that purpose, a different question would arise. In the absence of these, plaintiff's exhibit 4 was a self-serving document and under the general rule inadmissible when offered in his own behalf. Plaintiff could not make it admissible by first offering a prior self-serving writing by the defendant. Both writings were prepared after the controversy had arisen and with litigation in view. Neither was useful in determining the truth or falsity of any purported fact stated in the other. If plaintiff regarded exhibit 2 as an admission against interest by the defendant, it was perhaps admissible when offered by plaintiff, but this would not make plaintiff's reply thereto either competent or relevant when offered by plaintiff. Schwarzschild & Sulzberger Co. v. Pfaelzer, 133 Ill. App. 346.

The same rule must be applied to plaintiff's exhibits 7 and 8 which represent similar attempts of the parties to communicate their thoughts to each other with reference to the subject matter of this suit after the suit was begun. The admission of these exhibits was serious error.

The judgment must be reversed and the case remanded.

REVERSED AND REMANDED.

486 - 22920

FEHR CONSTRUCTION COMPANY,
a corporation, et al., Appellees,

vs.

POSTL SYSTEM OF HEALTH BUILDING,
On appeal of CHAPIN & GORE, a
corporation, Appellant.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

209 I.A. 237

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by Chapin & Gore, a corporation, one of the defendants below from a decree of the Circuit Court of Cook County which decreed the foreclosure of mechanics' liens in favor of certain intervening petitioners, Harty Bros. & Harty Co., James H. Roche and Pickett & Feldon, appellees.

A former decree entered in the same cause was reviewed by this court, 189 Ill. App. 519, and the facts set forth in the opinion then filed, need not be repeated here. That decree was reversed and remanded as to the present appellees for the reason that the respective amounts found to be due contained allowances for items which were in the opinion of this court non-lienable, and there was no evidence in the record from which the court could determine the amount which should be allowed for the lienable as distinguished from the non-lienable items. This court stated, however, that it did not pass on the question of whether Chapin & Gore had knowledge of the materials furnished or the work done under the contracts of the present appellees.

The Circuit Court has taken evidence on these

matters and upon that, as well as prior evidence and the report of the master to whom the cause was previously referred, entered the decree from which this appeal is taken.

Appellant in its brief seeks to re-open the questions which were considered upon the former appeal. This cannot be done. Csburn v. McCartney, 121 Ill. 408.

The only questions which we may now consider are, whether appellant had knowledge of the work to be done and material furnished by the respective lienors, and whether there has been included in the amounts for which liens have been allowed to appellees any items which are non-lienable under the former decision of this court. Two chancellors have found (overruling the finding of the master in that regard) that appellant did have such knowledge and we are not able to say from an examination of the record that the finding is manifestly against the weight of the evidence.

The decree seems, as to each petitioner, to have complied with the directions of this court in separating lienable from non-lienable items, and in this respect is also supported by the evidence, and will therefore be affirmed.

AFFIRMED.



PAULINE ROESSLER KREMSER, formerly
known as Pauline M. Roessler, Guardian
of the person and estate of Fedora
Roessler and Carl Roessler, minors,
and FEDERAL UNION SURETY COMPANY,
Appellees,

vs.

MEEKER-MAGNER CO., a corporation,
WILLIAM A. ROGAN and THOMAS J.
MAGNER,
Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 238

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered by the Municipal Court of Chicago against appellants Meeker-Magner Company, a corporation, William A. Rogan and Thomas J. Magner. It will be unnecessary to discuss each of the forty-one assignments of error, none of which appellants insist have been waived.

The action was originally in replevin by the plaintiff as guardian of her minor children to recover possession of nine certain bonds and coupons thereto attached. The property was not delivered on the writ and the plaintiff as guardian thereafter by leave of court filed her statement of claim in trover.

The defendants filed an affidavit of merits and the cause was tried on the issues thus raised by the court without a jury.

The evidence showed that Mrs. Kremser as guardian of her minor children owned the bonds and coupons in controversy; that the Federal Union Surety Company had been, but was not at the time of trial, doing business in

Illinois; that its general agent was defendant, Meeker-Magner Company; that the surety company signed the bond of the plaintiff guardian in the Probate Court; that on May 25th, 1911, the guardian deposited with Meeker-Magner Company the property in question, taking its receipt therefor which stated "to be held by us in connection with joint control". This receipt was on the stationery of the Federal Union Surety Company and was signed "Meeker-Magner Co., Gen'l Agts. by M. B. Idarius." The joint control referred to was that of the guardian and the Federal Union Surety Company.

Sometime afterwards the bonds and coupons were stolen from Meeker-Magner Company by one of their employees. Attorneys were employed and suits brought by Meeker-Magner Company, as the result of which, the bonds and coupons stolen were returned to its possession. The company made claim for expenses and attorney's fees incurred and claimed the right to hold the property until these were paid. Rogan was its attorney.

A witness for plaintiff testified that prior to the beginning of the suit he made a demand for the property in question on defendants Magner and Rogan in behalf of the guardian and that this demand was in writing. A copy of the demand was identified but not offered in evidence.

Defendant Rogan was called as a witness for plaintiff but denied that he ever had possession of the bonds and coupons after he was notified they belonged to the guardian, or at the time nor after any demand was made on him for them. Attorney for plaintiff, Mr. Cloyes, called on rebuttal, testified to a conversation with the defendant, Thomas J. Magner, in which he demanded the bonds. Magner said that he,

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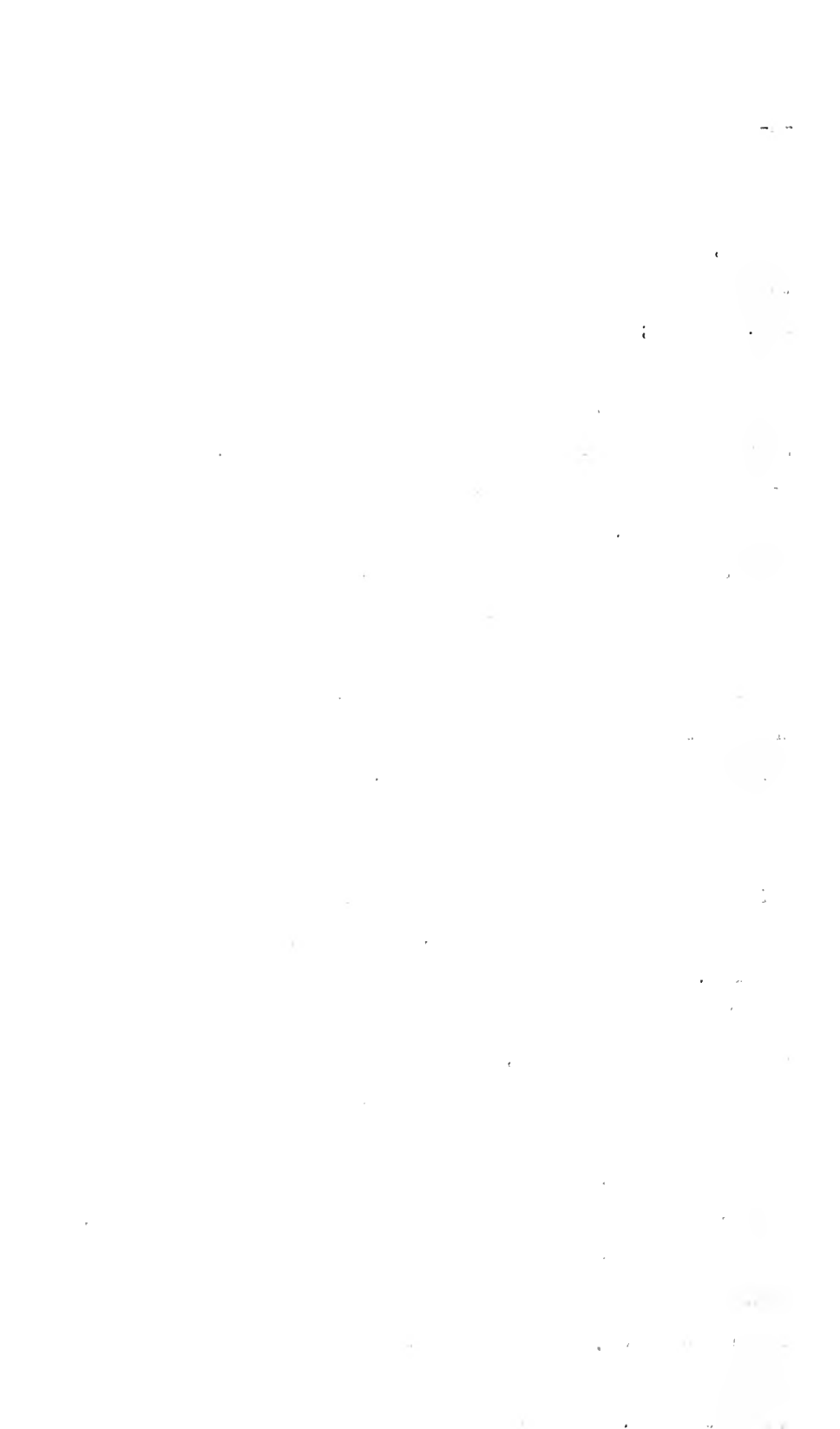
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Magner, had supposed that these bonds were turned over to the representative of the Federal Union Surety Company or to Mrs. Kremser; that the property had been delivered to defendant Rogan for that purpose and that Rogan had given a receipt for the property to the Meeker-Magner Company which Magner promised to send witness a copy of. That a copy of such receipt was delivered to the witness by mail a few days later. This supposed copy of Rogan's receipt was admitted in evidence over objection.

During the trial the surety company was made co-plaintiff and the evidence for the guardian re-offered and received in behalf of both plaintiffs. Upon this evidence the court entered a judgment in favor of the joint plaintiffs against the three defendants.

The plaintiff tried the case on the theory that a demand had been made on the defendants for the property prior to the trial and that the defendants had wrongfully refused to deliver it and were, therefore, guilty of conversion.

Irrespective of whether a proper demand was made or any demand necessary, or whether the Federal Union Surety Company was properly a co-plaintiff, the evidence fails to prove the plaintiff's case as to either of the defendants, Rogan or Magner. As to Magner there is no evidence in the record that he ever acted in this matter in a personal way, or other than as an official of the corporation. The conversation between Magner and Cloyes would tend to prove a cause of action against Rogan, but Magner was not Rogan's agent and a conversation with Magner was not admissible as against Rogan. If Magner had been called as a witness and testified to these things as facts, a different case would



be presented. The purported copy of Rogan's receipt for the property dated May 8, 1915, was improperly received in evidence in the absence of proof to lay the foundation for its introduction.

It is apparent that upon such meager proofs this judgment as to Rogan and Wagner cannot stand, and being erroneous as to some must be reversed as to all.

It will be reversed and the cause remanded.

REVERSED AND REMANDED.

UNITED STATES FASHION &
SAMPLE BOOK COMPANY, a
corp.,

Appellant,

vs.

W. D. SCHMIDT, trading as
W. D. SCHMIDT & COMPANY,
Appellee.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209 I.A. 240

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Appellant, plaintiff below, appeals from a judgment rendered by the Municipal Court of Chicago on the verdict of a jury directed by the court in favor of the defendant.

The plaintiff's demand was for \$686.75 claimed to be due on account of goods, wares and merchandise.

The defendant filed a claim of off-set against the plaintiff which set forth that defendant was entitled to certain credits and damages on the transaction between the parties "which sums of money are due the defendant less the sum of \$686.75 as sued for by plaintiff, leaving a balance due defendant of \$484.20".

In an amended affidavit filed after the trial began, the defendant set up the defense that the plaintiff was a corporation for profit organized under the laws of the state of Pennsylvania, etc. and that it was and had been doing business in the state of Illinois, although never authorized to do so, and by reason of the statute approved May 18th, 1905, could not maintain its action. The trial court directed a verdict on that ground.



Appellee now argues for affirmance on the ground that the original statement of claim did not state a cause of action. We think this statement made known to defendant the nature and amount of plaintiff's demand and was, therefore, sufficient. It is also urged that there is no evidence in the record tending to prove plaintiff's claim, but we think the admissions of the defendant in the pleadings made a prima facie case for the plaintiff and cast upon the defendant the burden of proving its off-set.

Plaintiff was a corporation organized under the laws of Pennsylvania and had never complied with the statute. Its principal office and factory was in Philadelphia, - its business the manufacture and sale of sample books used by tailors. It had an office in Chicago in charge of its vice-president, but did not manufacture any goods here and no stock was kept on hand, but orders were taken by samples and these orders sent to Philadelphia where the goods were thereafter manufactured and shipped to the customers.

The usual form of contract was similar to the one out of which this suit arose, the material parts of which were as follows:

"Chicago, Ill. Sept. 26, 1911.

W. D. Schmidt & Co.,
835 W. Jackson Blvd.,
Chicago.

Gentlemen:

We hereby formally accept your order to manufacture your Sample Books for the season of Spring and Summer 1912 as follows: * * * * *

Books are to be shipped you November 20th to December 1st.

Price to be at One Dollar and Ninety Cents (\$1.90) per book, f. o. b. cars Chicago. * * *

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2.6.1(6)

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2.14.1(6)

2.15.1(6)

2.16.1(6)

2.17.1(6)

2.18.1(6)

2.19.1(6)

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2.22.1(6)

2.23.1(6)

Your acceptance hereon will constitute a contract between us.

Very truly yours,

(Signed) F. T. Stephenson, Chicago Mngr.

U. S. Fashion & Sample Book Co.

Accepted: W. D. Schmidt & Co."

We think that since the contracts were made within the state, it must be held that the plaintiff was doing business within this state, but the real question is whether the business so carried on constituted interstate commerce. If it did constitute interstate commerce then the statute would not be applicable. Lehigh Cement Co. v. McLean, 245 Ill. 326. If it was wholly intra-state as distinguished from interstate commerce, then the statute would apply and the verdict should have been directed. Guest Piano Co. v. Ricker, 274 Ill. 448; Ryerson & Son v. Shaw, 277 Ill. 524. The rule which must be applied in deciding this question is stated in International Text Book Company v. Pigg, 217 U. S. 91, - "Importations into one state from another, is the indispensable element, the test of interstate commerce; and every negotiation, contract, trade and dealing between citizens of different states which contemplates and causes such importation, whether it be of goods, persons or information, is a transaction of interstate commerce."

It appears in this case that while the contract here in question was made within the state of Illinois, its provisions contemplated the manufacture without the state of the goods contracted for and the shipment of said goods from the state of Pennsylvania into the state of Illinois and this, we think, under the definition, must be held to constitute interstate commerce. It is true that in the case of International Text Book Co. v. Pigg, supra, the

contract there sued on was completed and entered into outside of the state in which the suit upon it was brought. Nevertheless, we do not think that fact was of controlling importance and in the later case of Sioux Remedy Co. v. Cope, 235 U. S. 198, the court applies the same rule in a suit brought in South Dakota on a contract which was made in that state which required that the merchandise sold should be shipped by the plaintiff from its place of business in Iowa to the defendants at their place of business and residence in the state of South Dakota. We cannot distinguish this last case from the one at bar.

The judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

496 - 22930

PANAGIOTIS KAPERONIS,
Appellee,

vs.

KALODINOS BROTHERS ICE CREAM
& CANDY COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 212

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment rendered in favor of the plaintiff by the Municipal Court of Chicago.

Plaintiff's statement of claim set up a demand for balance due for wages on account of services amounting to \$1289.36, for which the judgment was rendered on the verdict of a jury.

Other defendants were originally joined, but the cause was dismissed as to them prior to the trial. The defense set up by the affidavit of merits was that neither the balance alleged in the statement of claim, nor any other sum, was due.

Rule 17 of the Municipal Court of Chicago which is made a part of the record provides that the affidavit of merits shall specify the nature of the defense, and reasonably inform the plaintiff of the defense which will be interposed, and that only such defenses as are thus set up shall be admitted on the trial.

The court over plaintiff's objection received and denied the motion of plaintiff to strike out evidence offered by the defendant tending to show that a partnership

existed between plaintiff and defendant at the time the services sued for were rendered. No such defense was alleged by the affidavit of merits.

Plaintiff proved that the defendant was a corporation and introduced evidence tending to show that it conducted the business at the store where the plaintiff rendered his services. He further proved that the party with whom he claimed to have made his agreement for his services was president of the defendant corporation.

Appellant relies on an alleged written agreement for a co-partnership with the plaintiff which plaintiff denied he had signed. While the jury found the facts in plaintiff's favor on this issue, it was not properly before them and should not have been submitted to them. Kadison v. Fortune Bros. Co., 163 Ill. App. 276.

The errors assigned and which are argued here were made almost wholly to such issue and matters relating thereto. Appellant may not complain of a judgment which cannot be reversed except by considering evidence which he improperly introduced.

We cannot say that the evidence properly before the jury on the issues raised by the pleadings is insufficient to support the verdict on which the judgment was entered. It will, therefore, be affirmed.

AFFIRMED.

JOSEPH MOFFETT,
Appellee,

vs.

CALUMNET & SOUTH CHICAGO
RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT
OF COOK COUNTY.

209 I.A. 243

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment rendered by the Circuit Court of Cook County in an action on the case, brought by plaintiff below Joseph Moffett, for injuries alleged to have been sustained by him on the 29th day of January, 1910, while a passenger upon one of the cars of appellant.

The negligence alleged in the declaration was the careless management and operation of the car upon which plaintiff was a passenger and there was evidence tending to show such negligence.

Plaintiff was examined on the night of the accident by a physician who was called as a witness by defendant and he was examined on that evening also by his family physician who testified as a witness for plaintiff. The testimony of these physicians is conflicting as to the nature and extent of the injuries which plaintiff sustained. Another witness for defendant, Dr. Sweeney, examined plaintiff February 16th, following the accident and testified that his examination did not disclose any objective indications of injury, although plaintiff made many complaints of pain, etc. at that time.

On April 9, 1911, plaintiff was operated on for appendicitis which he claimed, but defendant denied, was the

result of the injuries received in the accident. This was the principal matter in controversy at the trial.

During the examination of Dr. Thomas, a witness called by the plaintiff, counsel for the plaintiff put a hypothetical question, reciting certain hypotheses based on the evidence, unnecessary to be repeated here, and asked the witness whether as a medical man he was able to form an opinion as to whether or not there was a connection between the supposed accident and the appendicitis referred to therein. The defendant objected to the question on the ground among other things, that it called for an opinion on an ultimate question of fact, and the objection being overruled, the witness answered, "As I said I had an opinion that this was a traumatic appendicitis due to this accident, to this injury he received at that time." A motion to strike out this answer was overruled by the court.

It is urged by appellant that this answer of the witness invaded the province of the jury. In the case of Kimbrough v. C. C. Ry. Co., 272 Ill. 71, one of the matters at issue was whether a tumor on the breast, or the condition of neurasthenia from which the plaintiff suffered was the result of the injury. An expert witness in response to a hypothetical question answered "That the tumor resulted from the bruise, - the injury to the breast. The neurasthenia resulted from the shock of the accident and was kept alive by the breast condition."

The Supreme Court reviewing the record reversed the judgment and said, - "Whether or not the collision or accident in this case caused traumatic neurasthenia in the defendant in error or caused the tumor in her breast are ultimate facts upon which the jury must make their findings. It is no more proper, legally, for physicians to settle those

questions for the jury by their direct answers than it would be for a motorman of another street car company to settle the question of negligence by testifying in broad terms that the plaintiff in error was guilty of negligence because its motorman failed to cut off the power by use of the canopy switch in time to prevent the collision."

So in this case the question of whether or not the accident which occurred on January 29th caused traumatic appendicitis which made an operation necessary on the 9th day of April following, was one of the ultimate questions in the case which it was the duty of the jury to pass on. The motion to strike the answer of the expert should have been sustained. Kimbrough v. Chicago City Ry. Co., 272 Ill. 71.

The amount of the verdict was \$3000 which, under the evidence would be deemed excessive unless the jury in fixing the amount took into consideration this attack of appendicitis.

The principal testimony for the plaintiff on that subject was contained in the answer above referred to. The error in allowing such answer to go to the jury was, therefore, serious and could not be cured by a remittitur. (Lauth v. Chicago Union Traction Co., 244 Ill. 244.) This error became more serious in view of a subsequent erroneous ruling of the court which excluded a hypothetical question put by defendant to its expert witness (Dr. Kahlke who had performed the operation for appendicitis on the plaintiff) calculated to bring out defendant's medical theory on the same matter. C. & E. I. R. Co. v. Wallace, 202 Ill. 129.

For the errors indicated the judgment must be reversed and the cause remanded for another trial.

REVERSED AND REMANDED.

PATRICK MCCARTHY,
Appellee,

vs.

C. H. MORGAN and J. H. SULLIVAN,
doing business as C. H. Morgan
& Company,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2031A 244

MR. PRESIDING JUSTICE HOLCOM

DELIVERED THE OPINION OF THE COURT.

This was a trial before court and jury, which resulted in a verdict in favor of plaintiff and against defendants for \$300, and after a remittitur of \$200 a judgment for \$100 was rendered, from which judgment defendants appeal to this court.

The record discloses naught but the statutory record. This projects for our decision the question whether a cause of action is stated in the statement of claim. If not, the motion to arrest the judgment should have been allowed. The following is the statement of claim:

"Plaintiff's claim is for damages to his horse; for veterinary services expended in attempting to cure said animal; for loss of services, all occasioned by the negligence of the defendants, and each of them, their agents and servants in that behalf, in carelessly and negligently operating their automobile on, to-wit: October 20, 1913, at or near the intersection of 51st street and Wisconsin avenue in the City of Chicago; and without giving any warning of the approach of said automobile, and for running the same at a dangerous and reckless rate of speed, and for the negligent operation thereof, resulting in damage to the plaintiff as follows: depreciation of value of horse, \$275; loss of services of horse, 24 days at \$6 per day, \$144 (said horse being part of double team). Veterinary bill for attending said horse, \$10. Total \$429."

This certainly states no cause of action. Carelessness and negligence of defendants are averred, and an injured horse figures in the statement; but how the horse was

injured, by whom and where, the statement fails to disclose. For aught that appears in the statement to the contrary, the horse may have been securely in a stable at the time defendants' automobile was being recklessly and negligently driven at or near the intersection of Vincennes avenue and 51st street, Chicago. Nor is there any statement in the pleading of defendants that supplies any information as to how the horse was injured. The pleadings read together state no cause of action. It is not a question of a cause of action defectively stated, which a verdict will cure, but a total failure to state any cause of action.

This is a case of the fourth class, which requires that the statement of claim show a legal liability, and if the action is in tort, it must show not only damage, but a breach of a legal duty. The statement in the record totally fails in this regard. A failure to make a motion for a more specific statement of claim does not waive the defect in the statement. Gillman v. Chicago Ry. Co., 268 Ill. 305.

A statement which avers damage but fails to aver negligence does not state a cause of action. Levy v. Swift, 261 Ill. App. 484.

An amended statement of claim if filed on a remanding of the cause to the trial court, would state a new cause of action which would be vulnerable to a plea of the statute of limitations. Therefore the judgment of the Municipal Court is reversed and a judgment of nil capiat and for costs against plaintiff is entered in this court.

JUDGMENT REVERSED AND JUDGMENT
OF DE CALIAT HERE.

DAVID STAHL and JACOB STAHL,
copartners, doing business
as Stahl Brothers,

Appellants.

vs.

LOEB, COONEY & LOEB, In-
corporated,

Appellees.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 LA 245

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The plaintiffs, David Stahl and Jacob Stahl, doing business as copartners, brought suit in the Municipal court against defendant, Loeb, Cooney & Loeb, for breach of a contract. At the close of plaintiffs' evidence on motion of defendant the court instructed the jury to return a verdict for defendant. The jury returned a verdict as directed and judgment was entered thereon by the court. Plaintiffs bring the case here by appeal for review.

The suit brought by plaintiffs is based upon a claim made by them against the defendants for the sum of \$794.13, being the amount of damages which plaintiffs insist they sustained by reason of a breach of a contract which it is alleged was entered into by the plaintiffs and the defendant for the sale and delivery to defendant by plaintiffs of a carload of eggs.

The terms of the alleged contract are indicated by four telegrams between the parties; the first of these telegrams is as follows:

"Gonzales Texas February 26 - 1912.
Loeb, Cooney & Loeb, Chicago, Illinois.
Wire best bid car eggs immediate shipment.
Stahl Bros."

On the next day and in response to this telegram the defendant wired the plaintiffs as follows:

"Chicago, Illinois, Feb. 27, 1912.
 Stahl Bros. Gonzales, Tex.
 Offer seven ten your track immediate shipment to New
 York. Answer.
 Loeb, Cooney & Loeb."

This last telegram was received by plaintiffs at
 Gonzales, Texas, at 9:30 a. m. on the day it was sent, Febru-
 ary 27, 1912. On the same day at 11:20 a. m. the plaintiffs
 wired defendant as follows:

"Gonzales, Tex. Feb. 27, 1912.
 Loeb, Cooney & Loeb,
 Chicago, Illinois.

Accept offer Shipping Southern Railway care Penna
 Ship Saturdays car Cotton Belt care Penna Probably
 move another car tomorrow same price also can move
 another car Saturday. Wire bid quick.
 Stahl Brothers."

At noon of the same day, February 27, 1912, de-
 fendant wired plaintiffs as follows:

"Withdraw our offer of this morning. Market lower."

We are required to determine whether a completed
 contract was entered into between the parties as a result of
 the telegrams above set out. The plaintiffs' theory is that
 the defendant became a party to an actionable contract at the
 time when defendant delivered to the telegraph company at
 Gonzales, Texas, at 11:20 a. m. February 27, 1912, the tele-
 gram of acceptance of plaintiffs' offer.

It is conceded that the negotiation for sale of
 the eggs was begun by plaintiffs and that they directed the
 defendant to communicate with plaintiffs by telegram. The
 defendant in accordance with the instructions of plaintiffs'
 telegram of February 26, 1912, made an offer by telegram to
 purchase the eggs. As a material part of this offer the
 plaintiffs were requested to answer. Following the direc-
 tions to answer the offer, defendant delivered to the telegraph
 company for transmission to plaintiffs a telegram of acceptance
 of the offer made by defendant for the eggs, but before this

acceptance of the offer was received by plaintiffs the defendant wired the plaintiffs withdrawing the offer.

The question which this court is asked to decide is whether the delivery of the withdrawal telegram to the telegraph company was a delivery to the plaintiffs. Stated differently, did the plaintiffs by their instructions to defendant to wire its bid for the carload of eggs constitute the telegraph company their agent so that it may be said as a matter of law that the delivery of the withdrawal telegram to the telegraph company was a delivery to the plaintiffs themselves.

An offer of sale or purchase of merchandise may be withdrawn at any time before the acceptance of the offer has been received by the offerer. (Larson v. Jordan, 56 Ill. 204.) Ency. L. & P. vol. 9 - 295 - Contracts.

"Since agreements made by means of the post or the telegraph are simply an illustration of the general rule before stated that the offerer takes the risk as to the effectiveness of communication if the acceptance is made in the manner either expressly or impliedly indicated by him, it necessarily follows that the contract is complete as soon as the letter containing the acceptance is mailed or the telegram sent, and it makes no difference whatever that through mistake of the post office authorities or the telegraph company, or through accident in transmission, it is delayed or is lost in transit and never received by the offerer. This is now the well settled rule in England and Canada, and in the United States, except perhaps in Massachusetts, where it has been held that the acceptor takes the risk of his letter being lost or delayed."

It should be noted here that the defendant requested plaintiffs to answer the offer made by it. Under the authorities, the plaintiffs would have no right to consider the contract complete until they had actually notified the defendant of the acceptance of the offer. This was a condition of the offer itself. Plaintiffs were not authorized on receipt of the offer to regard the contract as complete and

to proceed to deliver the merchandise to defendant, at New York. Their first duty was to notify defendant of their acceptance of the offer. Plaintiffs did, in fact, send a telegram notifying defendant of their acceptance of its offer, but before this message was received by it, defendant had delivered its withdrawal message to the telegraph company. While the question is not free from doubt, we are inclined to the opinion that the weight of authority favors the contention that the delivery of the withdrawal telegram to the telegraph company was a delivery to the plaintiffs and was in sufficient time to prevent the completion of the contract.

In Adams et al. v. Lindsell, 1 B. & Ald. 681. an offer to sell merchandise was made by letter which directed an answer "in course of post." This letter was misdirected by the defendants, as a result of which it was not received by plaintiffs until three days after it was posted. An answer of acceptance was immediately sent in response to this letter, but owing to the delay caused by the misdirection of the letter defendant had sold the merchandise. The important inquiry in that case was, as here, whether the defendants, having suggested the means to be used in acceptance of its offer, were bound as of the time when the acceptance was actually posted, or as of the time when it was in fact received by them. It was held that the contract was completed as of the time when the acceptance was delivered to the post.

We think there is much force in the argument that the correspondence indicated an intention on the part of the plaintiffs not to be bound by their offer until they had actually received an answer thereto.

While in Hass v. Meyers, 111 Ill. 420, it was held that where a party makes a proposal by letter and the

other party accepts such offer, the contract between them becomes valid and binding from "the instant of mailing the acceptance"; yet in that case it was held that the offerer might require that an acceptance of the offer be actually received by him before the contract should be regarded as completed, and that if he did so, he would not be bound by his offer until he had actually received the communication of acceptance.

The plaintiffs first proposed the telegraph company as an agency to transmit communications between them and defendant. Defendant's offer to purchase the merchandise required an answer to be received by it of its offer. This condition of the offer excludes any thought that the defendant should be bound by the acceptance of its offer before receipt by it of such acceptance. Before it had in fact received the offer of acceptance, it had deposited with the agent of the plaintiffs its telegram of withdrawal. The contract never having been completed plaintiffs cannot recover.

Plaintiffs seek to obtain a judgment against the defendant for defendant's breach of an alleged contract. The only evidence which we are able to find in the record which tends to prove the amount of the damages sustained by plaintiffs, if any, is the testimony of David A. Stahl, who testified that -

"When this car of eggs was rejected by Loeb, Cooney & Loeb we instructed De Winter & Co., commission merchants of New York, to sell same at once, which they did, and said sale netted us \$2,045.57, or \$794.13 less than the offer made us by Loeb, Cooney & Loeb for said car of eggs."

This testimony was admitted over objection and motion to strike it from the record. We think that the objection should have been sustained.

Had the defendant in fact been guilty of a breach of contract as alleged, plaintiffs would be entitled to recover damages for any loss they might have sustained thereby, and it

was permissible for plaintiffs to prove that they had elected to treat the merchandise as the property of the defendants and to sell the same for the best price obtainable. Evidently this is what plaintiffs attempted to do, but the proof offered is far short of proving that the eggs were sold for the best obtainable price, or that plaintiffs or their agent had used reasonable diligence to obtain such price. A material part of the evidence admitted with reference to the amount of plaintiffs' damages was inadmissible because on its face it appears to be based upon matters of pure hearsay.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

130 - 23470

JOHN F. O'CONNOR et al.,
Appellants,

vs.

HIGH SCHOOL BOARD OF EDUCATION
OF EVANSTON HIGH SCHOOL DISTRICT,
et al.,

Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

209 L.A. 251

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal involves the same matter heretofore considered by the court in case No. 23469, opinion this day delivered.

For the reasons stated in that opinion, which is adopted as the opinion in this case, the order of the Circuit Court is reversed and the cause remanded with directions to enter an order dismissing the bill for want of jurisdiction.

REVERSED AND REMANDED
WITH DIRECTIONS.

191 - 23157

FRANK KOCHANSEKI,

Appellee,

vs.

THE COUNTY OF COOK,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

209 I.A. 257

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

In the court below, appellee recovered judgment in the sum of \$115., in a suit in assumpsit against the County of Cook for salary alleged to have accrued after being illegally removed from a civil service position of assistant engineer. The declaration consisted of the common counts and a special count which is substantially as follows; that appellee, on August 1, 1900, took and passed the civil service examination for assistant engineer, which was in the classified service of Cook County, and was placed on the eligible register; that on August 22, 1900, he was appointed to the position of assistant engineer for Cook County and occupied that position until September 7, 1913, when he was laid off without any charge being preferred against him; that the appropriation bill passed by the County Board on February 1, 1913, appropriated for his employment at the rate of \$120., per month, and board; that no charges have ever been preferred against him; that, without cause, he was prevented, by appellant, from working in said position, from September 7, 1913, thereafter. The appellant filed a plea of the general issue.

The testimony of appellee is to the effect that in August, 1900, he took a civil service examination, conducted by the Cook County Civil Service Commissioners, for engineer, and passed with a grade of seventy; that he took and passed an examination before the Board of Examining Engineers of Chicago, and obtained a license issued by said Board; that a short time afterwards, he received a certificate of appointment, to go to work at the Dunning Institution, and went to work there on August 22, 1900; that he worked there as assistant engineer until March 1, 1913, when he went to the Oak Forest Institution and worked there until September 7, 1913; that at that time the Superintendent at the Oak Forest Institution asked him to quit; that the next day he went to the office of the Civil Service Commission, in the County Building, and there was asked to bring proof that he was under the Civil Service; that he received \$120. a month while working at Dunning and Oak Forest; that after he left Oak Forest, on September 7, 1913, he could not, between then and December 1, 1913, get work; that on July 1, 1912, the State of Illinois took over the Dunning Institution; that, thereafter, until March, 1913, he worked for the State of Illinois, and received, therefrom, his pay, during that time.

On the file cover (made for the papers in his case), with the number 3298, bearing appellee's name and the title of the Board of Cook County Civil Service Commissioners, was a notation, "Records Missing." By stipulation it was admitted that the Cook County Board of Commissioners passed an appropriation for the fiscal year 1913, for the position of assistant engineer at \$120. per month.

The evidence on the part of the appellee, shows certain entries on page 88 in the Register Book which is required to be kept by the Civil Service Commission. Among those entries appears the name of appellee, Frank Kochanski, under the head "Sub-classified D-Trades", but a line in red ink is drawn through the name of Frank Kochanski and the name of Robert F. Work is substituted. The date of the application; the approval of the application; date of examination, percentage credit, and certification for appointment, are all in red ink; also, "Attendant at Dunning" is in red ink, and, under the heading "Remarks", appear the words, "Refused Appointment" in red ink.

On January 18, 1913, the Cook County Civil Service Commission wrote to appellee, requesting him to call, immediately, at the office of the Commission "relative to reinstatement as Asst. Engineer (temporarily), County Hospital," and stated, further, that if he did not respond on or before January 28, 1913, it would be taken as an indication that he did not want appointment and the position would be filled. The records of the Cook County Civil Service Commission, in a report under date of January 18, 1913, signed by A. A. McCormick, President of the County Board, shows that appellee, on that date was temporarily appointed to the position of Assistant Operating Engineer, Class G, Rank 2, Grade 1. On January 28, 1913, appellee wrote to the Civil Service Commission of Cook County that he desired to waive appointment and not have his name certified until he should notify them; that his reason for waiving was that he wished a permanent position; that he desired his name to remain on the list of eligibles.



An examination of the evidence as it pertains to his unquestioned employment for over thirteen years, leads us to the conclusion that appellee has sufficiently shown that he was legally appointed as assistant engineer. Further, from the testimony of appellee, it appears that on July 1, 1912, the State of Illinois took over the Dunning Institution, and that he was employed by, and received his salary from, the State of Illinois, during that period. On December 21, 1912, the Cook County Civil Service Commission established a rule that "the employees who were in the classified Civil Service of Cook County on the day when the State of Illinois took over the Dunning Institution * * * are to be considered as County employees and to be so treated upon reinstatement lists." It is claimed by appellant that, although it be assumed that appellee was legally appointed in the first instance, upon the severance of his connections with the Dunning Institution and the State of Illinois, he was then only on the reinstatement list, and that it became necessary for him, therefore, to prove that there was a vacancy in the position of assistant engineer after March, 1913, when he left the Dunning Institution, and, by reason of the rule of December 21, 1912, was then on the reinstatement list. The evidence of appellee, however, shows that after he left the employment of the State of Illinois, at the Dunning Institution, he went to work at the Oak Forest Institution, and, in support of his contention as to his right to that position, the records of the Cook County ^{Civil} Service Commission, in a report dated January 18, 1913, signed by the president of the County Board, show that appellee was, on that date,

temporarily appointed to the position of assistant operating engineer, Class G. Rank Two, Grade One. Under those circumstances, we are led to the conclusion that it was unnecessary for appellee to prove that there was any vacancy or that he was entitled to a vacancy, if one existed. It is also claimed by appellant, that the evidence fails to show that at any time during the period for which appellee claims salary, he rendered, or offered to render, any service to the County. Appellant cites Kenyon v. City of Chicago, 136 Ill. App. 227 and, Kearney v. County of Cook, 187 Ill. App. 435. We do not think those cases pertinent. In this case it is not denied that appellee was discharged, and, it follows that under those circumstances, a further tender of his services would have been entirely superfluous.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

286 - 23252

E. C. KADOW and COMPANY,
a corporation,

Appellant,

vs.

C. E. DOBBINS,

Appellee.

APPEAL FROM

MUNICIPAL COURT,

OF CHICAGO.

209 I.A. 269

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellant, having brought suit in replevin, for a "one 3-spring pedler-top wagon", the trial judge (the cause being tried without a jury) entered judgment in favor of the appellee and ordered that a writ of retorno habendo issue for the return of the property to the appellee.

A firm known as Zimmerman and Cohen, who made and sold wagons, purchased, from time to time, in the course of quite a number of years, general wagon stock, that is, parts, from appellant, with whom they had an open account. The parts and material so bought, they used in the construction and manufacture of wagons, which they then sold. On March 26, 1915, Zimmerman and Cohen executed, and delivered to appellant, a note for \$150., due May 25, 1915, with interest at 7%; and, also at the same time and to secure the note, executed and delivered a chattel mortgage upon the following goods and chattels: "Material for Two (2), three (3) Spring Pedler Top Wagons, wheels, axles, springs, lumber and other material in the course of construction, located at 2343 W. Taylor St."

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It is the contention of the appellant that the wagon in question is chiefly made up, if not entirely, of the material which was covered by the chattel mortgage. On the other hand, it is the contention of the appellee that the evidence does not show, sufficiently, that the material mentioned in the chattel mortgage was used in the manufacture of the wagon in question. The evidence on the part of the appellant is to the effect that the wheels, springs, axles, spring box, fifth wheel, shaft coupling, general castings, ceiling, single tree hooks, drop forgings, T-plate, were all furnished by appellant and covered by the chattel mortgage in question. On the other hand, the evidence of the appellee is to the effect that Zimmerman and Cohen made two wagons, one of which was sold to a third party; that the other, the one in question, was sold by Zimmerman and Cohen to the appellee, in part settlement of an account which was overdue; and that the material in it was not that covered by the chattel mortgage.

Appellee, a pedler, who claimed to be a wagon and carriage maker, testified that on January 3, 1916, he bought the wagon, which was replevined, from Zimmerman and Cohen; that up to the time Zimmerman and Cohen went out of business, in the latter part of January, 1916, he had been doing business with them, selling them stock and material; that they owed him some money and he took the wagon in part settlement of the account; that he got possession of the wagon in January, 1916; that he, himself, got a painter and had it painted and had a pair of shafts made, and had it trimmed up. Zimmerman testified that, in the wagon in question, he did not use any of the material that he got on credit and "gave a chattel mortgage for"; that the wagon

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in question was built by him for appellee.

There is some evidence in regard to a settlement of part, or the whole, of the amount due on the note of March 26, 1915, but it is too vague to be considered.

The critical question in the case is whether the appellant has shown by a preponderance of the evidence that the material that went into the wagon was covered by the chattel mortgage. The evidence of Allan, Leslie and Kadow, who testified for the appellant, is to the effect, as stated above, that the material in the wagon was covered by the chattel mortgage. On the other hand, Zimmerman, who was the maker of the wagon, testified, positively that the material mentioned in the chattel mortgage was not used in the manufacture of the wagon in question. The trial judge, who saw the witnesses and heard the evidence, evidently concluded that the appellant had failed to prove that the materials which went into the construction of the wagon which was replevined, were the materials covered by the mortgage, and, as that conclusion is not manifestly against the weight of the evidence, we do not feel justified in overruling it. In view of the foregoing it becomes unnecessary for this court to consider the other question whether or not the chattel mortgage was invalid.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

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362 - 23328

DR. IRVING H. EDDY,

Appellee,

vs.

E. J. HEALY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 T 4 270

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

Appellee recovered judgment against appellant in the sum of \$100., for medical and surgical services rendered the wife of appellant. Although it is conceded, on this appeal, by appellant, that appellee was entitled to some compensation for his services, it is claimed that he was not entitled to recover more than \$25; and that, therefore, the judgment of \$100., is excessive.

The facts are, that on February 24, 1914, the wife of appellant was attacked, while in her home, by a defective or insane man, who cut her throat with a butcher knife and left her lying bleeding to death. About 1:15 P.M., she was found, unconscious, by her husband, and appellee was called. He made a hurried examination and had her put in an ambulance and removed to St. Joseph's Hospital. The cut extended practically from one angle of the jaw to the other - straight through. The trachea was severed completely; the hyoid muscles were severed; the external jugular vein was severed; likewise, the fascia and trachea between the larynx and hyoid bone.

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The evidence shows that appellee, with the assistance of Dr. Puckman, together with two internes, performed an operation, cleansing the wound and sewing together the various structures throughout the full length of the cut. The operation was performed at the instigation of appellant. Appellee was at work on the operation for about forty-five minutes, in which time the operation was completed. Five minutes thereafter the patient died.

Three physicians testified that \$100., was a very reasonable charge for the services; whereas, a fourth, called by the defendant, said that \$25., would be reasonable.

The evidence shows that the operation which appellee was called upon to perform, required a degree of skill that is not possessed by the regular physician or surgeon. Appellee, at the request of the appellant, undertook to save the life of his wife, and, we may assume, used all the skill he possessed for that purpose. It is difficult, of course, to appraise such services, but, considering all the circumstances, and bearing in mind the testimony of the experts, we are of the opinion that the judgment is not excessive.

Finding no error in the record, the judgment is affirmed.

AFFIRMED.

20 2 - 23168

JOSEPH PAVLAK,

Appellant,

vs.

AERMOTOR COMPANY,
a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

209 I A. 2-1

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Joseph Pavlak brought suit against the Aermotor Company to recover damages for the loss of his right eye as a result of an injury received while in the employ of the defendant. At the close of the plaintiff's case the court, on motion of the defendant, directed a verdict in its favor.

The declaration on which the case went to trial consisted of eight counts. The first count alleged that defendant was engaged in the manufacture of various articles of steel, iron and metals; that plaintiff was in its employ as a laborer engaged in chipping rough and uneven particles of iron and sand from iron castings; that in doing the work the casting was laid on a table; that it was the defendant's duty to keep and maintain the table in a reasonably safe condition, but that it negligently allowed and permitted the table "to become in a loose, unsteady, shaky and defective condition," by means of which plaintiff in the performance of his work was compelled to place his face closer to the castings, and as a consequence, a particle

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of iron or chip struck plaintiff in the right eye.

The second count was substantially the same, except it further alleged that plaintiff was afraid that injury would result to him from the condition of the table, unless it was made safe; that he informed his vice-principal of the defective condition, who promised to repair the table and requested plaintiff to continue at his work; that relying on the promise plaintiff continued to work, but defendant did not repair the table and that before a reasonable time had elapsed plaintiff was injured.

In another count there was a further allegation that by reason of the defective condition of the table plaintiff was unable to cause the particles of iron chipped from the castings to fly away from him as he would have been able to do if the table had been firm and not shaky.

The fourth and fifth counts charged that the defective condition of the table rendered the place in which plaintiff did his work dangerous and unsafe, and that it was practicable for defendant to have protected plaintiff from the injury and from the dangerous place.

The evidence disclosed that plaintiff was about forty years old at the time of the injury; that he had about fifteen years experience as a chipper, having worked about seven years for another company and about eight years for the defendant; but that his work had not always been continuous. The table on which plaintiff worked at the time of the accident was two or three feet wide and four or five feet long, and between three and four feet high,- the height of an ordinary table. It was made of

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wood and supported by four wooden legs. The method of chipping was to place the iron casting on the table, take an ordinary chisel in one hand and a hammer in the other and by striking the chisel with the hammer, the rough parts of the casting would be chipped off. It was the custom for the chippers when at work to wear goggles to protect their eyes, and it was the rule of the defendant that no one be permitted to work without goggles. There was a storeroom at the factory where the men were supplied with goggles. The evidence further tends to show that the table at which plaintiff was working at the time was "wabbly" or unsteady- - shaky, and had been in this condition for more than a week before the accident. Plaintiff testified that he had been working on the table for three weeks, and that it began to wobble the second week and was very unsteady for three days before he was injured. It appears that when plaintiff would strike the chisel with the hammer the table would sway from him about an inch and then come back. There is also evidence that it "wobbled"; but it is not very clear just what was meant by this. Plaintiff further testified he called the attention of the foreman or straw boss to the condition of the table, and stated he was afraid he would be injured, unless the table was made steady and firm; that on the day of the accident he again spoke of the matter and stated that unless the table was fixed he would quit his work and started to leave the factory; that thereupon the foreman requested plaintiff to continue his work saying he would have the table repaired at once; that he had broken his goggles that day and went to the storeroom for another pair, but was advised that there were no goggles to be had and none could be obtained until the next day;

that he was requested to go back to work and promised he would be furnished with another pair the next day, and about twenty minutes thereafter the piece of iron from the casting on which he was working struck him in the right eye; that he went to a doctor, had the eye dressed and in about an hour returned and worked the rest of the afternoon; that shortly afterwards on account of the injury it was necessary to remove the eye. There was other testimony that tended to show that at the time there was a great deal of dust in the room where plaintiff was working, tending to show that there was insufficient light. Plaintiff further testified that on account of the unsteady condition of the table he was unable to control the direction in which the chips would fly when released from the casting. The general manager of the defendant company was called as a witness on behalf of the plaintiff and testified among other things that the only danger in the chipping work is that a particle of metal might fly in the man's eye, but if a particle should strike the face there would be no serious injury, nothing but a scar.

Plaintiff contends that the court should not have directed the verdict, for the reason that where a servant continues to work, relying upon the master's promise to repair, the assumption of risk by the servant is suspended for a reasonable time within which to make the repairs; and that in the instant case, as plaintiff was injured before the lapse of a reasonable time within which to make the repairs promised, the only question that remained was whether the danger was so obvious that the plaintiff in continuing

his work was guilty of contributory negligence, and that this was a question of fact for the jury. In support of this contention the cases of Wheeler v. Chicago & Western Indiana R. R. Co., 267 Ill. 306; Illinois Steel Co. v. Schymanowski, 162 Ill. 447; Springfield Boiler & Mfg. Co., v. Parks, 222 Ill. 355 are cited. We think these cases are not applicable to the facts in the case at bar, but that it is controlled by the law as stated in the case of Webster Mfg. Co. v. Nisbett, 205 Ill. 273. In that case the declaration alleged that the defendant negligently furnished plaintiff with an old, insufficient, unsafe and dangerous tool with which to work; that defendant was notified of such condition and thereupon promised to repair it and induced plaintiff to continue its use. The evidence there showed that plaintiff at the time was at work as a blacksmith in the defendant's shop, working as a helper and was using what was known as a "backing hammer", the face of which was somewhat chipped; that a few days before the accident the hammer was shown to the defendant's foreman by the plaintiff and complaint made that the hammer was out of repair; that on the day of the accident plaintiff again took the matter up with the foreman, asking that the hammer be repaired, and the foreman told plaintiff to go ahead and use it and he would have it fixed and requested plaintiff not to stop the job, as the defendant was in a hurry. Plaintiff then continued his work and was shortly afterwards injured by a flying particle of steel from the hammer. The court there held there was no liability. In that case it was shown that plaintiff had a long experience in handling hammers such as the one he was using when injured. The plaintiff there contended that he did not assume

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the risk from the defective hammer, for the reason that the defendant's foreman promised to repair it. The court held that the assumption of risk was not suspended by the promise to repair, as that rule did not apply to a simple implement or instrument. It is there said (p.277): "The general rule is, that when the master, on being notified by the servant of defects which render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of the promise without being guilty of negligence, and if any injury results therefrom he may recover, unless he should continue in the employment when the danger is so imminent that no prudent man would undertake to perform the service. The promise of the master in such case relieves the servant from the charge of negligence by continuing in the service. * * * But the rule which exempts an employee from assuming the risk where a promise to repair is made is designed for the benefit of those engaged in work where machinery and materials are used of which the employee has little knowledge, but it does not apply to ordinary labor, which only requires the use of implements with which the employee is entirely familiar." To the same effect are Kistner v. American Steel Foundries, 233 Ill. 35 and Gunning System v. La Pointe, 212 Ill. 274. In the instant case the table and tools which plaintiff was using at the time of the injury were of the most simple construction, easily understood, and with which plaintiff was entirely familiar. We are therefore constrained to hold that plaintiff assumed the risk.

Plaintiff next contends that the fourth and fifth counts of his declaration charged a violation of the Health, Safety and Comfort Act, in force July 1, 1910 (Chap. 48, R. S.). Section 1 of the act provides that all tables in any factory, mercantile establishment, mill or workshop shall be so located wherever possible as not to be dangerous to employes, or shall be properly enclosed, fenced or otherwise protected. All dangerous places in or about mercantile establishment, factories, mills or workshops, near to which any employe is obliged to pass or to be employed, shall, when practicable, be properly enclosed, fenced or otherwise guarded. And it is argued that where a violation of the statute is shown the defenses of assumed risk and contributory negligence are not available; that the fourth and fifth counts of the declaration charged that the place in which plaintiff worked was dangerous, and that it was practicable to have made it safe; that the evidence showed that the work could have been rendered safe by the defendant's supplying plaintiff with goggles, and that the absence of goggles was the direct cause of the injury. On the other hand the defendant contends that there is no count in the declaration that charges a violation of the act in question.

The fourth count averred, inter alia, that it was the duty of the defendant to maintain the table then being used by the plaintiff in a reasonably safe condition, and that the defendant negligently failed in this respect and permitted the table to become shaky, "by reason whereof the said table or bench was a dangerous place near which plaintiff was obliged to be employed; * * * that the

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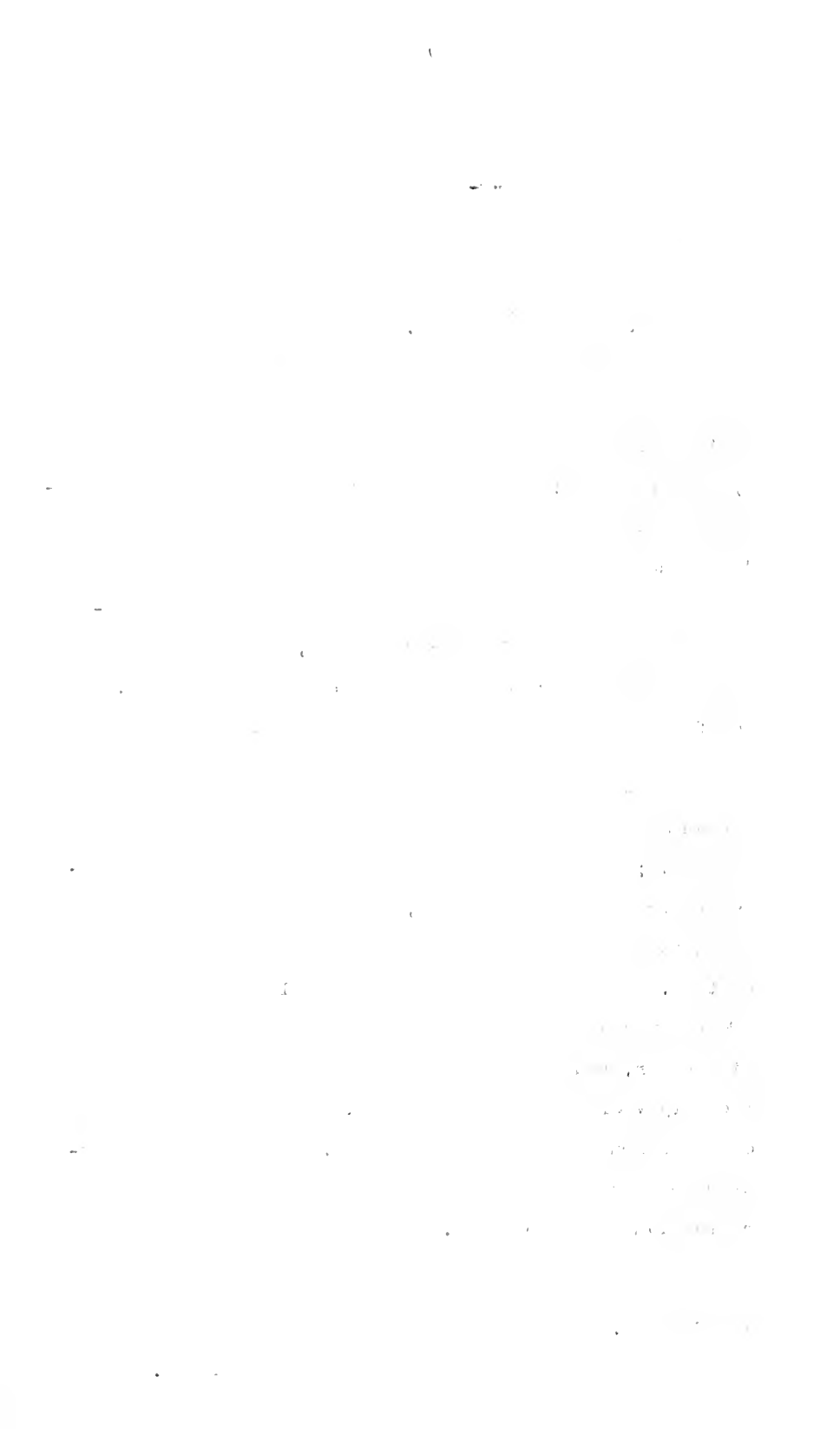
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said place was a dangerous place as aforesaid in that by reason of the aforesaid * * * defective condition of the aforesaid table or bench, the plaintiff was compelled to and did perform the duties of his said employment in such manner as to place his face in closer proximity with flying particles of iron and sand chipped from castings by the plaintiff; * * * that it was practicable for defendant to have protected the plaintiff from injury from such dangerous place in that if the defendant had exercised ordinary care to prevent the * * * table * * * from becoming in a * * * defective condition, the said condition and dangerous place aforesaid would not have existed." The fifth count is substantially the same.

It is obvious that the allegation that the place was unsafe is limited to the charge that the table was defective; and while it is elementary that it is not necessary to plead a public act, yet it must appear from the allegations that the action is based on a violation of the statute. We think it clear that the allegations did not allege a violation of the act in question. In the argument at the bar, counsel for plaintiff expressly stated that the only violation of the act relied upon was the failure of the defendant to furnish goggles. There is no allegation that would in any way inform the defendant that this contention was to be made.

The judgment of the Superior Court of Cook County is affirmed.

AFFIRMED.



246 - 23212

GEORGE J. KAPPES,

Appellee.

vs.

E. R. BACON,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 290

MR. JUSTICE O'CONNOR delivered the opinion of the court.

George J. Kappes brought suit against E. R. Bacon to recover \$216.60 claimed as commissions. The case was tried before the court and jury; there was a verdict in favor of plaintiff for the amount of his claim on which judgment was entered.

The record discloses that plaintiff was a real estate broker, and in the spring of 1914 inquiry was made of him by a prospective purchaser who wished to buy a piece of real estate on the north side. Plaintiff did not then have for sale the kind of lot desired, but stated he would endeavor to find such property. Afterwards plaintiff, through a representative, called on the defendant in reference to a vacant lot owned by him. This lot was afterwards submitted by the plaintiff to the prospective purchaser and negotiations were carried on from April until June or July following. Nothing further appears to have been done by the plaintiff, and in the latter part of September the prospective purchaser took the matter up direct with the owner, the defendant,

and purchased the property. After the deal was closed, plaintiff learned of the sale and demanded his commissions from the defendant, which were refused.

There is a conflict in the evidence as to what took place at the time the representative of the plaintiff called on the defendant in April, 1914. Plaintiff's representative testified that he called on the defendant and inquired concerning the lot; that the defendant stated that he would sell the property for \$120 a front foot; that the defendant then said plaintiff could list the property for sale; that he then informed the defendant that he was in the employ of plaintiff and that plaintiff had a prospective purchaser for the property; that the witness named the prospective purchaser to defendant and wrote down a memorandum of the defendant's terms and a description of the property.

Defendant testified that he did not authorize plaintiff to list the property for sale; that he told the representative that he had bought the lot to protect his residence which was adjoining and not as an investment; that he told plaintiff's representative, "if you bring me a man that will pay me all that I have put into it, all expenses and everything, and net me, with six per cent interest, bring him along;" that he also stated the property cost him \$120 a front foot.

The evidence further tended to show that a "listing card" was made out by plaintiff showing certain information about the sale of the lot, the price being stated thereon at \$120 a front foot; that the property was immediately submitted by plaintiff to the prospective

purchaser and negotiations conducted continuously until June or July following, at which time plaintiff testified the prospective purchaser told him he would drop the matter.

The witness McCabe, who was president of a north side bank and who represented his sister, the purchaser, testified that the property was submitted to him by plaintiff at \$120 a front foot; that negotiations were carried on between himself and plaintiff; that the matter dragged along, and afterwards in September he called up the defendant, made an appointment with him, and the deal was consummated, the purchase price being \$120 a front foot, with taxes, assessments and interest thereon; that during these negotiations no mention was made that the property had been submitted by plaintiff; that the witness did not mention the broker as he did not want to have a commission injected into the selling price, as he thought any commissions should be paid by the defendant.

Defendant contends that the verdict and judgment are not sustained by the evidence, in that it does not show that plaintiff was employed as a broker by the defendant, but on the contrary, it shows that plaintiff was the purchaser's agent; that the evidence fails to establish that plaintiff was the procuring cause of the sale; that the evidence shows that plaintiff had abandoned negotiations with the purchaser and afterwards the sale was made by the defendant himself. After a careful consideration of the record, we think the evidence was sufficient to warrant the submission of these questions

to the jury.

The defendant also contends that there was no sufficient legal proof of the value of the services for which plaintiff claims commissions. Plaintiff testified that he was a real estate broker and had been engaged in that business for about eleven or twelve years, and that the usual, reasonable and customary broker's fee in Chicago for similar transactions was five per cent of the purchase price. This testimony was in no way contradicted, and in these circumstances, we think it was sufficient.

The defendant further contends that plaintiff's statement of claim fails to state a cause of action. This was an action of the fourth class, and the Supreme Court has repeatedly held that no formal written pleadings are required in the Municipal Court; that the statement of claim is not the same as a declaration at common law; that it is sufficient if it merely states the account or nature of plaintiff's demand and gives such information as will reasonably inform the defendant of the nature of the case. Enberg v. City of Chicago, 271 Ill. 404. Under the law as there announced, we think the statement of claim was sufficient.

The defendant makes the further point that the representative of plaintiff who called on the defendant was not a licensed broker, and therefore the listing of the property with plaintiff, even on plaintiff's own theory, was illegal and void. There is no merit in this contention. The representative was merely a hired clerk of the plaintiff, the latter being a regularly licensed real estate broker.

It is not necessary under the ordinance that employes of a broker should be licensed.

Complaint is also made that the court erred in admitting the "listing card" in evidence which was made out by the plaintiff, giving certain information with reference to the sale of the property. Similar evidence was held properly admitted in the case of Wright, et al v. Olson, 191 Ill. App. 272. But in any event we do not think its admission in this case constitutes reversible error.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

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UNION RIBBON & CARBON CO.,
a corp.,

Appellee,

vs.

SIDNEY MORRIS & CO.,
a corp.,

Appellant.

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ALPHEA WOLF MUNICIPAL COURT
OF CHICAGO.

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MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

On motion of appellee the stenographic report of the trial of this cause has been stricken from the record because filed within an extension of time the court had no jurisdiction to allow, and, as all the assignments of errors and argument of appellant are predicated upon the stricken part of the record there is nothing now before the court for review, hence the motion to affirm the judgment will be allowed.

AFFIRMED.

THE PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

OLIVER F. PAISLEY, JAMES J.
PAISLEY and WILLIAM H. PAISLEY,
Plaintiffs in Error.

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

209 I.A. 205

STATEMENT BY THE COURT.

The defendants were indicted by the Grand Jury of Cook County on January 8, 1917, under three counts, in each of which they were charged with receiving as bankers deposits from Margaret Basch to the value of \$700 on September 16, 1916, when they were knowingly insolvent, and that such deposits were lost to Margaret Basch.

These counts charged that the acts recited were in violation of Sec. 25a, Chap. 38, Criminal Code, Hurd's Edition 1915-16, title "Bankers, etc."

On September 19, 1916, the defendants were conducting three private banks under the name of W. H. Paisley & Sons, one at 3545 Broadway called "North Shore Savings Bank," another at 5302 North Clark street named "Summerdale Savings Bank," and the third at Broadway and Grace street termed "Grace Street Branch," all three banks being located within about a mile of each other in the city of Chicago, and all three banks were conducted as private banks by the defendants as partners. The three banks were closed on the last mentioned date by the voluntary act of defendants, and on the application of one of them a receiver was appointed by the Superior court of Cook County, and soon thereafter, on an involuntary bankruptcy proceeding in the Federal District Court, the Chicago Title and Trust Company was ap-

pointed receiver of the three banks.

The evidence tends to show, and the People claim, that at the time the receiver took possession of defendants' three banks there was due to 1123 depositors with checking accounts \$151,296.96; to 2037 savings depositors \$102,099.15, and on account of 83 miscellaneous cashier's checks, certificates of deposit, etc., \$23,046.70, making a total of \$276,442.81 due depositors; that certain depositors had notes in the bank, which they were permitted to set off against their deposits, amounting in the aggregate to \$20,097.68, leaving a net total due such depositors, after making the aforesaid credits, of \$256,345.13; that there was due to other depositors, mostly banks, after allowing a set-off credit of \$12,264 on a note of one Laisley for \$20,000, \$205,166.23, making a total of liabilities unsecured due to all claimants \$461,511.36. There were liabilities secured amounting to \$100,952.84. The value of the securities, the record shows, was \$89,660, leaving a deficit of \$11,292.68 to be added to the unsecured liabilities, making a total of unsecured liabilities of \$472,804.20.

The assets to meet the unsecured liabilities were notes of the Laisleys, including one of the Summerdale Savings Bank, which it is insisted is a Laisley note, aggregating \$56,240.41, of which \$4684.01 were balances in Laisley accounts in the bank, making a total of Laisley notes of no value \$51,556.40; worthless notes of employees and persons insolvent, after allowing credits thereon, \$25,497.10, making a total of worthless notes \$77,053.50. At the time of the trial the receiver had realized upon the assets of defendants and their banks \$45,198.53. The estimated value of all the assets, excluding assets pledged as



collateral security and including the amount collected of \$45,198.53, was \$93,390.36.

From these calculations it would appear that there was a deficiency between assets and liabilities of \$379,413.84. The Paisley notes amounting to \$51,556.40 were worthless, and at the time of the trial nothing had been realized upon any of them.

The defendants went into the banking business in 1908 at 5545 Broadway, Chicago, under the name of "Edgewater Bank." In 1912 they started the Summerdale Bank at 5302 North Clark street. In April, 1914, the Edgewater Bank was changed into a State bank under the name of "Edgewater State Bank." This State bank was organized with a capital of \$200,000 and a surplus of \$25,000. The Paisleys subscribed for \$168,000 of the stock, which money they borrowed, pledging their stock as collateral security. Defendants also procured \$50,000 on a ten day loan, from the Union Trust Company. This borrowed money, with money obtained from capital stock subscriptions, made up the capital of the Edgewater State bank. All of the assets of the Edgewater bank were taken over by the Edgewater State Bank, which assumed all the liabilities of the old bank. Defendants guaranteed the payment of all notes and loans turned over to the State bank. These guarantees amounted to \$198,398.44. Among this indebtedness were the notes of the Paisleys and others, including an amount in the Summerdale bank of \$14,212.31, which were, in fact, the liabilities of the Paisleys, and amounted to the aggregate sum of \$80,175.48. These so-called assets were utterly worthless. The Badger Company and the Delmar Company were insolvent at the time their obligations were turned over to the Edgewater State Bank as assets; they were Paisley concerns.



The candy company subsequently went into bankruptcy with assets of less than \$3,000 and liabilities of \$26,000. Among other assets turned over to the Edgewater State Bank was the property in which its predecessor carried on its affairs, at the price of \$50,000, the true value being about \$27,000. This property was afterwards reconveyed and a bond issue thereon of \$50,000 taken by the Edgewater State Bank, and thereafter the defendants opened the North Shore Savings Bank in the building which the Edgewater State Bank vacated. At this time the defendants were insolvent and without cash to finance the bank. On the morning the bank was opened defendants made a cashier's check for \$1,000 and cashed it at the Edgewater State Bank. They protected this cashier's check by making a deposit in the Chicago Savings Bank of money which came into the bank from depositors. On August 1, 1916, six weeks before all the banks suspended, defendants started another bank at Grace street and Broadway, Chicago, which they styled the "Grace Street Branch." During the six weeks life of this bank about \$16,000 was deposited. These deposits were transferred as they were received to the North Shore Bank and used to keep that and the Summerdale Savings Bank afloat.

Numbers of witnesses were examined to prove that they were depositors, and also the amounts of their several deposits.

Among many matters in evidence bearing upon the question of the insolvency of defendants and their knowledge of such insolvency are these:

In May, 1916, all the defendants met at the Continental & Commercial National Bank of Chicago, at which meeting that bank was represented, also the State

Bank of Chicago, State and Lake Bank, The Chicago Savings Bank and Trust Company, and the Edgewater State Bank. What impelled the meeting was an assessment of \$60 a share made by the State Auditor upon the capital stock of the Edgewater State Bank. The banks held as collateral security 1288 shares which had been issued to the laisleys and by them pledged to the banks as security for loans aggregating in round numbers \$134,000. A failure to pay this assessment would have resulted in the suspension of the Edgewater State Bank. It was sought at this meeting to get this stock into the hands of those who would pay the assessment, and, failing so to do, to induce the holders of the stock as collateral to pay the assessment. The Continental & Commercial National Bank, the State Bank of Chicago and the Austin National Bank together held 650 shares of the stock, and, declining to pay the assessment, surrendered the stock. F. E. Zeiler and the Lake and State Bank paid the assessment on the stock which they held as collateral, retaining it. The financial affairs of defendants were discussed at length and it was stated at that meeting by the defendants' attorney, in their presence, that they were insolvent, and the defendants stated that they would go into bankruptcy unless the banks would accept their terms. They were threatened with suit by the Logan Square Bank upon a matured note. F. E. Zeiler had for two years before the banks were closed endeavored to collect \$21,000 due him, upon which no interest had been paid from September, 1914. The Austin National Bank entered a confession of judgment for \$4500, and satisfied this judgment by taking another note for the amount due. A similar judgment for \$5,000 was entered by the Ogden State Bank on June 17, 1915, which through its lawyer made a threat

to close the bank if the judgment was not immediately paid.

Defendant Oliver F. Paisley collected \$800 upon a mortgage for a Mr. Russell. The collection was not reported and it was not known until Russell's attorney made the discovery that the money had been collected for more than a year previously.

A collection from a bank in Sweden of \$2300 was made for one Anderson in April, 1916. The defendant Oliver F. Paisley instructed the cashier not to pay the money to Anderson when it was collected because they needed it; and acting thereon Anderson was several times told that the money had not been collected, and when defendants' banks were closed the money had not been paid.

In April, 1916, in order to secure the local office of the Western Union Telegraph Company as a depositor for the North Shore Savings Bank, the defendant Oliver F. Paisley, upon being requested by the Telegraph Company's representative to make a financial statement, instructed the cashier of the bank to make a false statement as to the bank's assets, which being made he caused to be delivered to the Telegraph Company, which, in faith of the truthfulness of such statement, opened an account and became a depositor.

A mortgage of one Wright was left with defendants to sell, who, instead of doing so, used it as collateral for a loan to themselves in the Phillip State Bank. This misappropriation was not discovered until after the banks failed.

The defendant Oliver F. Paisley was given \$3,000 by a Mr. Apgar for the account of his sister, with instructions to use the money for the purchase of a lot upon which Apgar was to erect a building with the defendant Oliver F. Paisley, who, instead of using the money as directed,

placed the same to his own individual credit and checked it out to pay his own indebtedness.

This defendant also drew checks on the North Shore Savings Bank totaling \$23,486.78 from April to September, 1916, during which period he had no funds in his own account with which to meet any of the checks. These checks were carried as cash items and on the day when the bank closed a note for the amount was substituted and the checks taken up.

On April 6, 1916, when Oliver F. Paisley's balance in the North Shore Savings Bank was \$1.54, he put in the note of one Lemoyne for \$3500, which he had taken from the Edgewater State Bank and which was an accommodation note. The purpose of so doing was to take up Oliver F. Paisley's check to that amount.

Among other transactions on March 24, 1916, was a mortgage note of Kent Wonnell for \$5,000 which defendant Oliver F. Paisley put into the bank, withdrawing checks totaling a like amount, which checks had accumulated during the prior five or six months and were carried as cash. The property mortgaged by Wonnell was worth about \$22,000 and was in fact the property of the defendant Oliver F. Paisley and was subject to two mortgages, one for \$12,000 and the other for \$10,000, making the \$5,000 note worthless.

On April 20, 1915, T. H. Paisley & Sons deposited a note for \$1392.35 in the Summerdale Savings Bank and took out that amount in cash, which note was lost.

On April 16, 1914, a note for \$14,000 signed "Paisley Bros." was put into the Summerdale Savings Bank and money to that amount was taken out, which money was used by defendants to pay part of \$50,000 borrowed from the Union Trust Company to pay for stock in the Edgewater State Bank.

Many other transactions of a like nature appear from the record. These transactions aggregated more than \$63,000, all of which the evidence proves to be worthless.

The operating expenses of the three banks resulted in a net loss of \$46,938.51. A witness, an auditor, who had audited the books of the defendants' banks, testified that the aggregate amount of the several sums which he recited had been drawn by defendants from the banks was \$124,335.85.

Two other items are claimed by defendants as assets of value. They are equities in 1100 shares of stock of the Edgewater State Bank and a certain 99 year lease upon vacant land at the southwest corner of North Clark street and Foster avenue in Chicago running to Ashland avenue and having a frontage of 84 feet on North Clark street, 266 feet on Foster avenue, and 144 feet on Ashland avenue. The value of this leasehold was attempted to be proven by defendants on the basis of an extensive contemplated improvement which would require the expenditure of a large sum of money, for which plans and specifications had been prepared, and it was claimed that when such improvements were made there would be a net annual income of \$25,000, which would make the value of the leasehold \$400,000. No attempt was made to prove the value of the lease on the day the banks suspended payment, beyond the fact that at one time defendants represented the value to be \$10,000 and at another \$30,000. The State contends that both of these items of assets were valueless.

The verdict of the jury found all the defendants guilty and fixed the punishment of Oliver W. Paisley and James T. Paisley at three years in the penitentiary and a fine of \$1400 each, and the defendant William H. Paisley

to one year in the penitentiary without a fine. Upon these verdicts judgments were entered and all the defendants seek this review on writ of error.

It is argued for reversal that the motion to quash the indictment should have been sustained; that the court erred in the admission and exclusion of evidence and in the giving of instructions proffered by the State, and also in not directing a verdict for defendants as requested, and that the judgment is contrary to law and the evidence.

MR. PRESIDING JUSTICE HOLCOM
DELIVERED THE OPINION OF THE COURT.

The indictment is said to be bad for the reason that defendants are indicted as partners and also because the indictment being for a misdemeanor, the things constituting the misdemeanor are charged to have been done "feloniously." The indictment in People v. Meadowsroft, 163 Ill. 56, charged that the act of receiving the deposit was feloniously done, yet the conviction was sustained. Conceding, however, for the sake of the argument that an act which is by statute a misdemeanor should not be charged in the indictment as having been feloniously done, that would not invalidate the indictment if in other respects it is without fault. The offending word would at most be regarded as superfluous and ignored. In People v. Wattyn, 191 Ill. App. 86, it is said:

"In some of the states the rule prevails that if an indictment charge a misdemeanor and the word 'feloniously' is used, the indictment is bad, but the prevailing doctrine is that in such a case the word 'feloniously' is regarded as surplusage, and the indictment is held to be good. 22 Encyclopedia of Law and Procedure, p. 223; Bishop on Criminal Procedure (3rd ed.), sec. 537."

The indictment in the inducement part of it recites that defendants were partners in the conduct of their

respective banks, but in the charging part the act of receiving the deposit while knowingly insolvent is averred against the defendants as individuals. Defendants were therefore indicted as individuals and not as a firm.

The books of the several banks in the hands of the receiver were duly proven and were therefore admissible in evidence against defendants. These books were not, as contended, the private books of defendants or either of them, and the rule excluding the receipt of the private books of a defendant as evidence against him has no application to the instant case. They were the books of the several banks and were admissible in evidence with as much force as they would have had had the banks been corporations instead of partnership concerns. People v. Smith, 144 Ill. App. 160; People v. Munday, 280 Ill. 32.

In the Munday case supra, the court cites Wilson v. United States, 221 U. S. 361; Theeler v. Same, 226 ibid 478; and Grant v. Same, 227 ibid 74, as sustaining authority, and say that in the Wilson case -

"the court goes fully into the identical question presented here, and holds that while one cannot be compelled to produce any of his private books or papers which may tend to incriminate him, he cannot refuse to produce the books or papers of a corporation of which he is an officer or in which he may be interested even though they may be in his custody and under his control, as they are not his private books and records but the books and records of the corporation."

The fact that defendants' banks were private banks and the books in question were those used in the business of these banks, does not take them out of the rule announced in the cases supra. The court did not err in admitting in evidence the books and records in the possession of the receiver. State v. Strait, 94 Minn. 389; Ensign v. Pa. State, 227 U. S. 559.



The Munday case, supra, is invoked as an authority that it was error to admit evidence of numerous depositors of the fact that they had made deposits in the several banks and had lost them. The condition of defendants' case is clearly different from that found in the Munday case on this point. In the Munday case the court said:

"It was conceded by counsel for plaintiff in error that these books correctly disclosed that fact and that no depositor had been re-paid. In view of this situation it was improper to permit the State to produce only a few of the depositors of the bank, having small deposits, to testify to the amount of their particular deposits and to the fact that they had never been re-paid. Such evidence could be of no assistance whatever to the jury in determining the guilt or innocence of the accused."

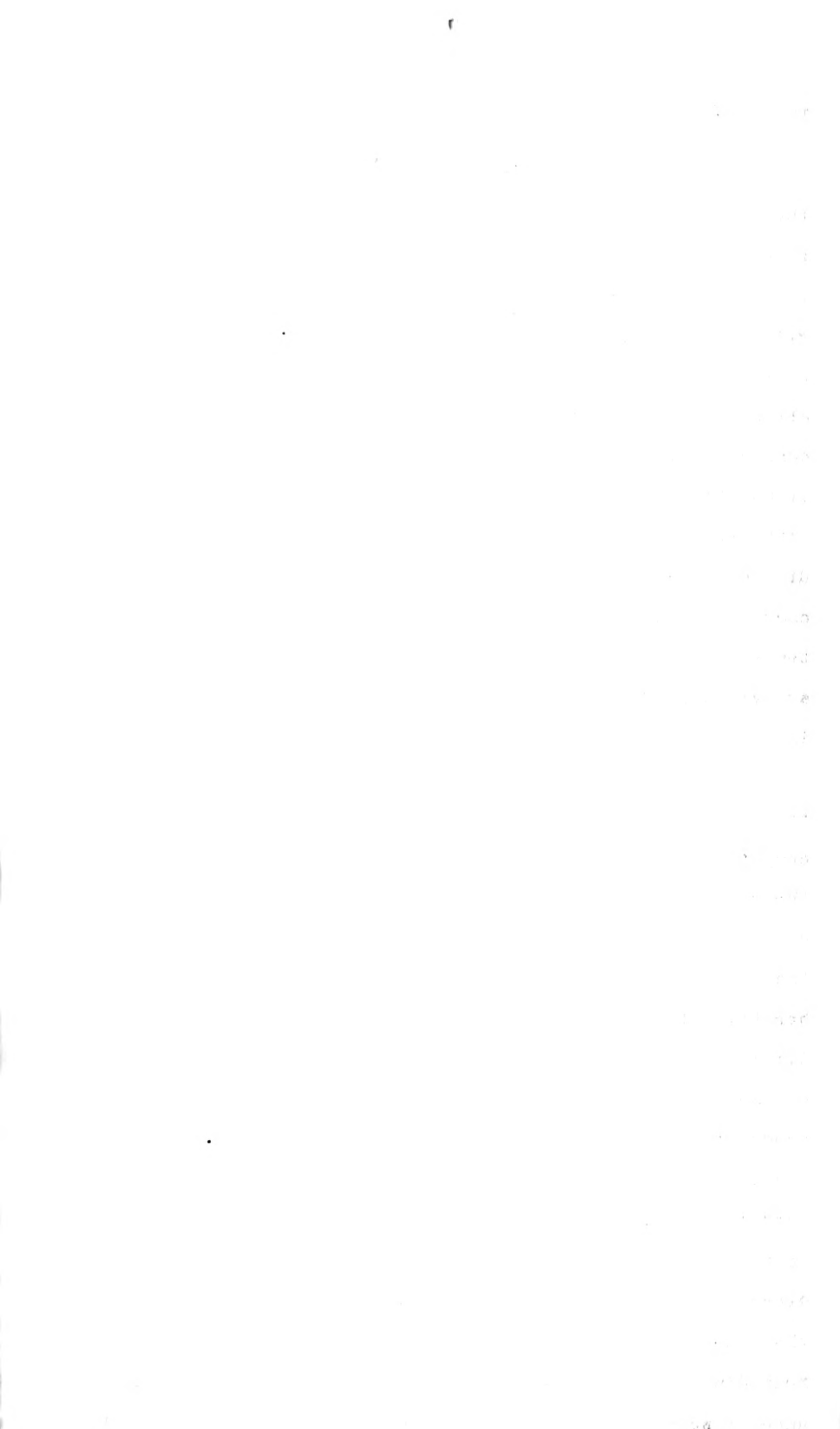
The defendants in this review made no concessions in regard to the books of account. It therefore became necessary to prove by numerous depositors the fact that they had made deposits in the bank and had lost their money. The defendants are complaining about the number of deposits proven, which were not meager nor insignificant in amount, as they were in the Munday case. In this condition of the proofs it was necessary to corroborate the books by the testimony of a large number of the depositors. The testimony of these depositors served also another purpose, and shows that after the failure of the banks each testifying depositor received a letter from the defendants which was identified and received in evidence, in which letter was a note signed by all the defendants promising to repay such depositor the amount of his deposit within three years. This tended to prove that the defendants had knowledge regarding the receipt of such deposits, were responsible for them, and that they were all connected with the insolvent banks.

The testimony regarding the Anderson collection of \$2300 from Sweden, the mortgage transaction with Wright,



the Russell \$800 mortgage collection, and the knowingly false statement to the local branch of the Western Union Telegraph Company, made to induce it to open a bank account with defendants, all of which acts are recited in the statement preceding this opinion, was clearly admissible. All of such transactions were part of the res gesta and connected with the business of the defendants' banks, transacted by them or some one of them at different times prior to the receipt of the Basch deposit. Such testimony did not relate to a criminal charge not connected with the charges in the indictment, and the fact that such evidence tended to prove reprehensible conduct was not inadmissible as evidence if it tended to prove the issues, which in the instant case it did.

The witness Frank M. Spahr's evidence regarding the insolvency of the defendants is challenged as being incompetent. This witness testified that he was employed by the receiver, the Chicago Title and Trust Company, to take charge of the receivership of the W. H. Paisley & Sons banks; that he had absolute charge of such receivership until December 11, 1916, and performed all acts of receivership to that time; that all the assets of W. H. Paisley & Sons came into his hands and that he received all the notes and books of the concern; that the receivership was pending in the Federal Court; that the parties in that proceeding were the defendants on trial, doing business as bankers and operating the North Shore Savings Bank, the Sumnerdale Savings Bank and the Grace Street Branch. This witness identified the books and the assets of the three banks and gave detailed information regarding them; he also gave a definition according to his understanding as to what constituted insolvency, with which definition we are in accord. This is the same witness whose



testimony in the Munday case ran along similar lines and who obtained information regarding the things about which he testified in practically the same way and under very similar circumstances as in the instant case. Such evidence was held competent in the Munday case, and we hold that Spohr's evidence in the case before us was for like reasons admissible, and competent. There was no invasion of the province of the jury in this witness giving his opinion as to the solvency of the defendants upon the very complete exposition of their affairs which he had obtained by thorough and intricate examination of all its books, property and assets. People v. Gerold, 265 Ill. 448, in which it is held that where original evidence consists of numerous books, documents, papers and records which cannot conveniently be examined in open court, and the fact to be proved is the general result of an examination of the whole collection, evidence as to such result may be given by any competent person who has examined the originals, provided the result is capable of being ascertained by calculation, is authority sustaining the contention of the State that Spohr's evidence as to the insolvency of defendants was admissible. Furthermore, the books were in evidence with many other documents relating to the affairs of the defendants' banks, and from them the witness Spohr gave a sufficiently detailed statement and enumeration to enable the jury, independent of the opinion of the witness, to arrive at the conclusion of defendants' insolvency at the time the Basch deposit was received. In fact, from the books, papers and documents of defendants in evidence, regardless of the deduction of the witness Spohr therefrom as to the insolvency of defendants, the jury might by calculation have come to the conclusion that defendants were insolvent at the time charged in the indictment; and, as a matter of fact,

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they could not have well come to any other conclusion. What the court said in Carter v. Carter, 152 Ill. 434, may be repeated here with like force:

"But if we are not correct in this, and it was an error to allow the witness to give his opinion, the error could do no harm, for the reason that the opinion of the witness added nothing to the facts he had detailed. From the facts detailed by the witness but one conclusion could be reached, and the opinion of the witness could add no additional force to that conclusion, and hence no injury resulted from the admission of his opinion."

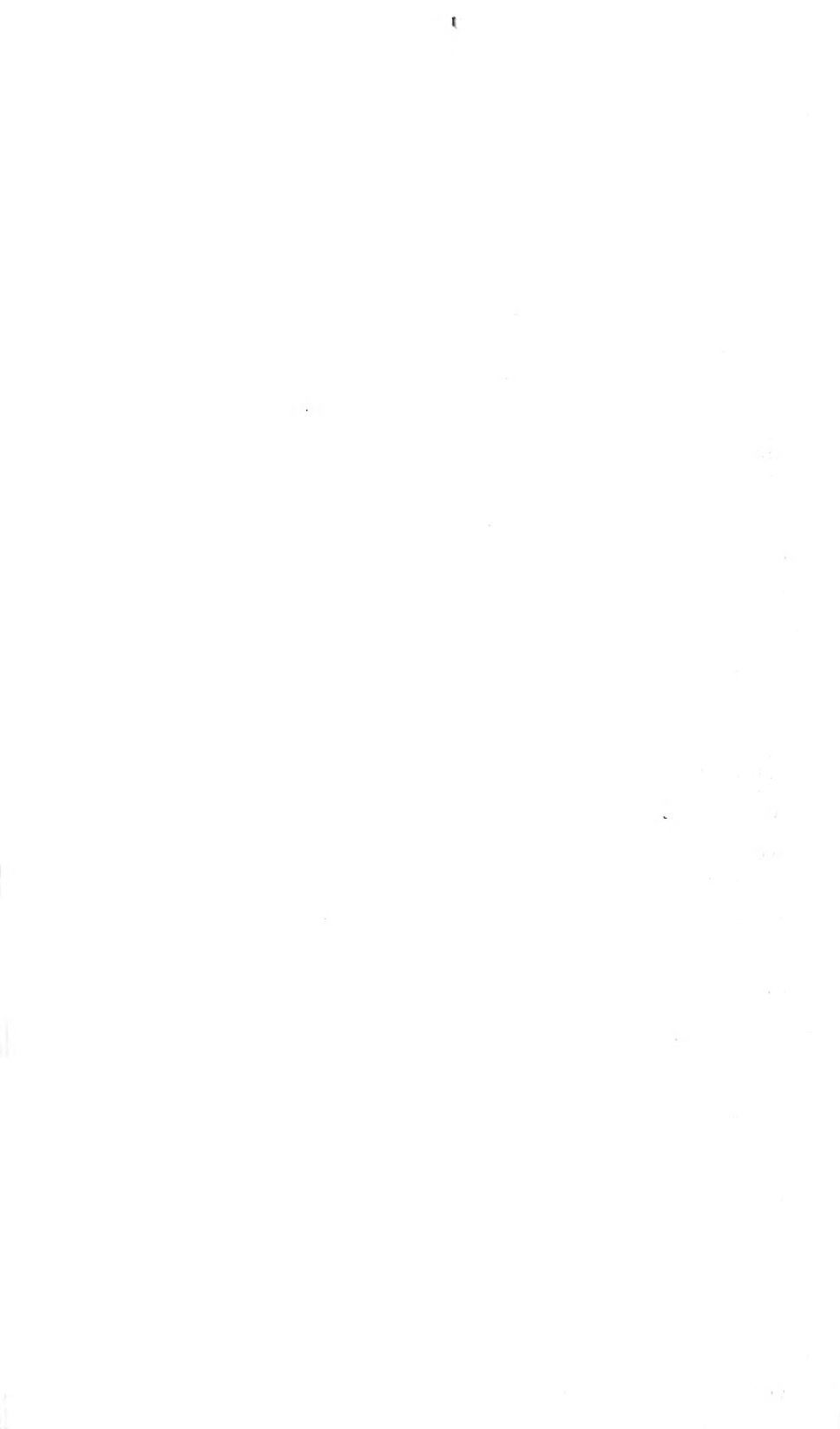
In Springfield v. Gee, 166 ibid 22, the court held that the opinion of the witness as to the degree of care used was improper and that the objection to the question and answer which produced such opinion should have been sustained; nevertheless the court said:

"The evidence in the record, however, shows appellee stated fully to the jury the manner in which she was walking and what took place just before and at the time of the injury. This evidence of a proper character was sufficient to authorize a finding that appellee exercised reasonable care and caution. The error in the admission of evidence is not of sufficient importance to require a reversal. Sterling Bridge Co. v. Pearl, 80 Ill. 251."

And the judgment was affirmed. Joliet v. Johnson, 177 ibid 178.

The conclusion of the witness Spchr as to the insolvency of the defendants was no invasion of the province of the jury, because the jury had before them the evidence upon which the witness founded his opinion, which amply sustained such opinion.

Again it is contended that the court wrongfully excluded evidence regarding the ninety-nine year leasehold property and its value as an asset of defendants, which value defendants sought to base upon an enterprise contemplated, the plans for which had been prepared by an architect and an estimate of rentals for various parts of the building when erected were obtained. The leased land was unproductive of any income, notwithstanding the fact that



it was a lot of large dimensions and eligibly situated. At the time the banks closed no contracts for a building had been let or any step taken, aside from the architect's plans, to finance or erect the building. The value of the fee of the leasehold land had been fixed at various times from twenty-five to eighty thousand dollars. By the terms of the lease the lessee was obligated to erect a building to the value of \$100,000 upon the leased land, to be completed by May, 1916. This condition of the lease had not been complied with and the ground rent was in arrears for some time. We think the ruling of the court as to the value of the leasehold was without error. The real question was the market value of the lease at the time defendants went into bankruptcy and their banks were closed. Such value they made no attempt to prove. In Tallman v. Railroad Company, 121 N. Y. 124, it was held that it was error to admit evidence as to what it would cost to erect improvements upon certain vacant lots, and what they would have rented for after they were constructed, as such estimates were purely conjectural. So in this case, there is no evidence that defendants had any arrangements made for financing the contemplated improvements upon the land, and what might have happened in regard thereto is purely speculative.

In regard to the value of the equity of defendants in the stock of the Edgewater State Bank, we think from the evidence its value was at least too uncertain to be capable of calculation as to what it was really worth. The evidence demonstrates that the Continental & Commercial National Bank, a banking institution of stability and ample capital, refused to pay the assessment of \$60 upon the shares of stock held by it as collateral, and thereupon

surrendered such stock, as likewise did the State Bank of Chicago and the Austin National Bank, also banks of ample means, while the smaller banks retained the stock which they held as collateral to loans, thereby assuming liability to pay the assessment. We cannot conclude from the evidence that the defendants' equity in this stock had any actual intrinsic market value on the day the banks were closed. Whether there was sufficient consideration for the surrender by defendants of their stock in the Edgewater State Bank is not a matter for adjudication in this proceeding. The fact remains they did surrender the stock.

It is contended that there is no legal proof that the draft for \$700 deposited by Margaret Basch was paid. There is proof found in the record that the draft was paid by the bank on which it was drawn and that defendants subsequently sent Margaret Basch a note promising to pay the amount in full. This was at least an acknowledgment that the draft was paid, and there is no evidence in the record challenging this proof. On the contrary, the draft was entered on the bank books as currency on September 18, 1916. It was likewise entered as a deposit on Margaret Basch's pass-book, and, further, the draft was cleared through the clearing house of Chicago, and the North Shore Savings Bank got credit for it through the Chicago Savings Bank and Trust Company, which institution the bank cleared. The record also shows that the Federal Reserve Bank paid the draft when it was presented to it in due course of business on the next day, and that the draft in evidence is marked paid. This meets every legal requirement. People v. Miller, 278 Ill. 490.

While we have not commented upon all the evidence objected to, an examination of such evidence requires us to

held that no reversible error is apparent.

The contention that the verdict is not sustained by the evidence is without merit. A careful scrutiny of all the unchallenged evidence in the record demonstrates that the defendants were guilty as charged in the indictment, that they were insolvent not only at the time the Masch deposit was made but for a long time prior thereto. Nor can it be truthfully said that it appears from the record that they were solvent at any time while they operated the three banks, which were closed first at the instance of one of the defendants and afterwards by creditors in an involuntary proceeding in bankruptcy. It is also quite clear that defendants knew they were insolvent and that they possessed such knowledge a long time anterior to the closing of their banks. The evidence shows that they resorted to many questionable and dishonest methods to keep the doors of their banks open, which methods were resorted to because of the known fact of their insolvency. Aside from these facts the rule is as stated in the Wadsworth case, supra, that -

"At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence of him not to know of his own insolvency."

And aside from this legal presumption of knowledge on their part, they had actual knowledge; for some time before the closing of the banks they were informed by their attorney that they were insolvent, and unless they wilfully shut their eyes to existing conditions they well knew they were insolvent at the time the auditor made an assessment of \$60 per share upon the stock of the Edgewater State Bank, and also at the time of a meeting of the defendants with

their attorney and some of their creditors at the Continental & Commercial National Bank.

The objections raised by the defendants to the instructions are confined to those given at the instance of the State, and therefore as no objections appear to have been made to the refusal of the court to give certain instructions proffered by the defendants, the latter are not before us for review. The instruction given by the court regarding the form of the verdict is in the language of the statute and is sufficient, and an examination of the other instructions given at the instance of the State discloses no error of a reversible nature.

It was the duty of the jury to fix a fine as a part of the punishment in the case of each of the defendants at double the amount of the Basch deposit. This, in the case of the defendants other than William H. Paisley, they did by inference, as they fixed the fine of these two defendants at \$1400, which is double the amount of the Basch deposit, as the law requires. Under the authority of the Meadowcroft case, supra, this was sufficient.

However, as to the defendant William H. Paisley, the verdict is insufficient to sustain the judgment, as the jury fixed his punishment at one year in the penitentiary without inflicting any fine. The statute provides that the punishment upon conviction shall be a fine of double the amount of the sum fraudulently taken, and in addition thereto the defendant may be imprisoned in the state penitentiary for not less than one year nor more than three years. The fine is a necessary and indispensable part of the punishment, and although where it is for less than double the amount, as in the Meadowcroft case, the defendant can not object, because the error is to his advantage, and of it



he therefore can not be heard to complain. The provision of the statute is mandatory as to some fine, and it cannot be dispensed with. Brown v. People, 173 Ill. 34.

In the instant case the jury showed evidence of a desire to treat the defendant William H. Paisley with leniency and recommended him to the clemency of the court in their verdict. If they had followed the law with a feeling thus made evident, they might not have sent him to the penitentiary. They might have dispensed with that part of the punishment which in their discretion they need not inflict; but they could not dispense with the fine which the statute makes mandatory as a punishment.

The contention that the fines are four times the value of the deposit is not well taken. The punishment is as to each defendant, and the fine as to each is within the amount fixed by the statute. The defendants being equally guilty they must pay the statutory penalty of a fine. The fine is punishment, not recompense.

For the errors indicated the judgment as against the defendant William H. Paisley is reversed and the cause as to him is remanded to the Criminal Court for a new trial. As to the defendants Oliver F. Paisley and James T. Paisley the judgment of the Criminal Court is affirmed.

REVERSED AND REMANDED AS TO WILLIAM H. PAISLEY
AND AFFIRMED AS TO OLIVER F. PAISLEY
AND JAMES T. PAISLEY.

COURTENAY BARBER,
Defendant in Error,

vs.

MELLISH-HAYWARD CO., a
corporation,
Plaintiff in Error.

ERROR TO CIRCUIT COURT OF
COOK COUNTY.

209 I.A. 299

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

On a trial before court and jury plaintiff had a verdict and a judgment thereon for \$1431.03, and defendant brings the record here for review. The instruments sued upon are as follows:

"Chicago, July 18, 1913.

Received of and accepted from Courtenay Barber, General Agent of The Equitable Life Assurance Society of the United States corporation policy No. 1838943 for \$15000 insurance on the life of Frank Mellish in the above named Company, the same being as applied for the premium for which is \$727.20 which we agree to pay August 1st, 1913.

Mellish-Hayward Co.,
Per Ralph B. Hayward, Treas.

Chicago, July 18, 1913.

Received of and accepted from Courtenay Barber, General Agent of The Equitable Life Assurance Society of the United States corporation policy No. 1838954 for \$15000 insurance on my life, in above named company, the same being as applied for the premium for which is \$478.65 which we will pay August 1st, 1913.

Mellish-Hayward Co.,
Per Ralph B. Hayward, Treas."

These instruments were offered and received in evidence and the verdict and judgment are for the amount of \$478.65 and \$727.20, agreed by said instruments to be paid with interest from the time when said sums were respectively due until the rendition of the verdict.

As has oftentimes been held by this and the Supreme Court, the abstract is the pleading of the parties, and such abstract must state sufficient of the record that

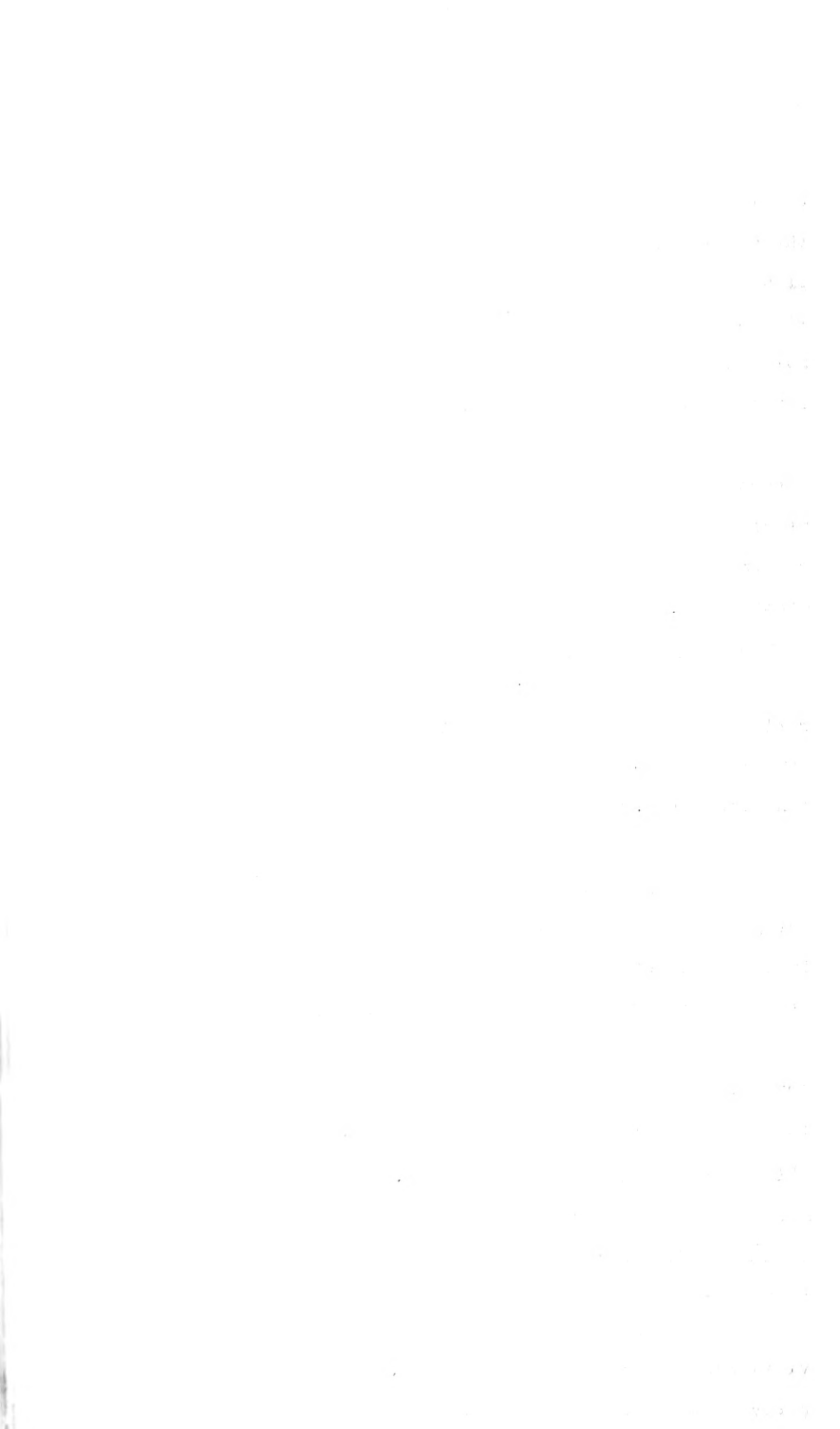
errors assigned can be determined from the recitations of the abstract. In this abstract we find neither declaration, pleas, nor any other pleading. It is impossible to determine, without an abstract of the pleadings, whether or not the rulings of the court on the admission and rejection of proffered evidence are erroneous.

While the affidavit of merits is fairly abstracted, we cannot say that it supports defendant's special plea; and while the affidavit challenges the sufficient execution of the insurance policies referred to in the instruments sued upon, it cannot be held to take the place of a plea of non est factum, which was the defense attempted to be made by the evidence upon the trial. Neither the declaration nor special plea is abstracted; we are therefore unable to say what were the issues joined. We do however find from the evidence in the record that the instruments sued upon were binding agreements and enforceable at law.

Lacking matters in defense which are reviewable, the judgment is supported by copies of such instruments found in the abstract and the offering and receiving of such instruments in evidence upon the trial.

We will not go to the record for information to reverse a judgment which the defendant should have furnished in the abstract. Salisbury v. Deutsch, 178 Ill. App. 633; Griggs v. Griggs, 204 *ibid* 160; Johnson v. Waldman, *ibid* 190; People v. Flannigan, *ibid* 548; DeLong v. Hruby, 203 *ibid* 206; People v. Shapiro, *ibid* 292; McCovern v. City of Chicago, 202 *ibid* 139.

The so-called abstract filed by defendant is violative of rule 18 of this court, which provides that a party bringing a cause to this court shall furnish a complete abstract or abridgement of the record. Where the



party bringing a cause to this court for review fails to file an abstract of the record, as required by rule 18 of this court, and the evidence as ascertained from the statements in the briefs is conflicting, the judgment will be affirmed. Campbell v. Campbell, 279 Ill. 337.

The judgment of the Circuit Court is affirmed.

AFFIRMED.

MORRIS KATZ,
Defendant in Error,
vs.
JOSEPH ELIA,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

209 I.A. 300

MR. PRESIDING JUSTICE HOLDON
DELIVERED THE OPINION OF THE COURT.

This writ of error really presents for our review but one question, and that is whether the trial Judge erred in denying the motion made by the garnishee to vacate the judgment against him. Another branch of this case was before us on appeal in General Number 23434, in which an opinion, not yet reported, was filed December 17, 1917.

Counsel dogmatically state legal propositions without citing any sustaining authority, contending that "none are necessary upon such plain points." One of these so-called "plain points" is that the court record can be contradicted by oral proof. We think counsel are far afield in their contentions regarding the law, and that failure to cite sustaining authority for such contention rests solely in the fact that none can be found in the books.

The record before us recites the presence of the garnishee in court at the time the judgment was rendered, and in this regard the record is self-supporting by its undenied recital that "execution herein be stayed until July 19th, A. D. 1916." We can hardly assume that plaintiff voluntarily moved to stay the execution upon his own judgment. This order was followed on the 25th of July, 1916, by a motion made by the garnishee to vacate the judgment entered on the 26th of June, 1916, the hearing of which motion was continued indefinitely; on the 8th of August, 1917, the mo-

tion was further heard and denied, and the order staying execution vacated and set aside.

The ground upon which the judgment was sought to be set aside was that certain attorneys for Frank Bavuso in the appeal case above cited claimed a lien upon the judgment of Bavuso against Elia; that a notice of such lien was served prior to the entry of the judgment, Elia stating in his affidavit that he did not know the legal effect of that notice. From this affidavit the garnishee admittedly had notice of the attorneys' lien claim before pleading and trial. His failure to interpose the same as a defense at the trial, if it was a defense, was inexcusable and was a sufficient reason for the trial Judge to deny the motion to vacate the judgment. This evidence was not newly discovered, but was in the possession of the garnishee at the time of the trial, and his failure to make a defense based thereon was a lack of the exercise of such diligence as the law requires. Therefore, there was no error in the denial of the motion to vacate the judgment, nor was so doing an abuse of that sound discretion which the law reposes in a judge in such circumstances. People v. Williams, 242 Ill. 197.

The evidence relied upon to defeat the recovery being admittedly in the possession of the garnishee at the time of the trial, his failure to bring the same forward at the trial as a defense is no reason for vacating the judgment.

The judgment of the Municipal Court is affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF ILLINOIS,
Defendant in Error,

vs.

ISAAC BERGER,
Plaintiff in Error.

WRIT TO MUNICIPAL COURT
OF CHICAGO.

209 I.A. 301

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

Defendant was charged on an information with violating Sec. 57, Chap. 38, R. S., in that he did on the 26th day of August, 1917, at Chicago, rent or let a room or rooms for the purpose of prostitution, fornication and lewdness, and on a trial before the court, without a jury, he was found guilty of "renting or letting rooms for the practice of prostitution or lewdness or fornication," and was fined two hundred dollars. Defendant sued out this writ of error in an effort to reverse the judgment.

Defendant argues the presumption of innocence, the reasonable doubt, presumption of innocence of fraud, illegality or crime, of an accused person, and that a woman is presumed to be chaste. These are all trite legal propositions, which the guilty as well as the innocent may freely avail of; but when all these presumptions are overcome by legal proof, they fade away and are no longer of any moment as defenses.

To recapitulate the evidence would serve no useful purpose; suffice it to say that it was sufficient to prove defendant guilty beyond all reasonable doubt of the infraction of the statute as charged in the information. Under the competent evidence in the record there is no room for speculation as to the purpose of the defendant

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as the keeper of the hotel which he was admittedly operating. Questions of the exercise of ordinary care as to the character of the inmates disappear in the light of the testimony that defendant rented his rooms to lewd characters of both sexes who came off the streets without baggage and tarried but a comparatively short time. From the testimony of the police given on the trial it is apparent that defendant was operating an establishment for the practice of sexual lewdness. His house was a disorderly one within the meaning of the statute; and on the date charged he did rent rooms for the purpose of illicit sexual indulgence between persons of both sexes. There was no error in the admission of evidence as to the character of the persons who were inmates of the house. Such evidence tended to establish the immoral character of the house. Knowledge of the character of the house is imputable to defendant, its proprietor, but aside from that there is affirmative evidence that rooms were rented on the occasion in question to persons for immoral purposes in the presence of defendant, who was told that the persons engaging rooms were not married, to which he replied that he did not care so long as they were registered.

It is contended that the trial Judge admitted incompetent evidence. Be this as it may, the trial being before the court without a jury, the presumption will be indulged where, as in this case, there is sufficient evidence in the record, unchallenged, to sustain the conviction, that the court heeded only competent evidence in arriving at its judgment. People v. Jacoby, 196 Ill. App. 88; Illinois Steel Co. v. Ireble Machine Works Co. 219 Ill. 403.

Counsel for defendant complains that the trial Judge would not allow him to argue the case for his client.

On this point the record shows that without any objection the trial Judge rendered his opinion and pronounced judgment, going over the crucial questions in the case very understandingly. Not until the judgment of the court was pronounced did counsel request to be heard in argument. At this stage of the case the trial Judge was justified and acted within his rights, and according to precedent, in refusing to hear further argument. After pronouncing judgment the case was closed. However, denying the privilege of argument to counsel will not of itself be accounted reversible error where the record clearly sustains the judgment being reviewed.

The judgment of the Municipal Court is free from reversible error and is affirmed.

AFFIRMED.

PAUL E. ROEGNER and EMIL F.
ROEGNER, doing business as
ROEGNER & COMPANY,

Appellees,

vs.

J. A. FREY,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I A. 303

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

On a trial before the court without a jury plaintiffs had judgment for \$187.50 and defendant appeals.

The evidence discloses that defendant owned a two apartment brick building numbered 1636 South Clinton Park, Chicago, upon which he put a price of \$7500, and gave it to plaintiffs' real estate brokerage firm to sell. The plaintiffs directed defendant's attention to some vacant land at Twenty-first place near Forty-seventh street as suitable for a trade; defendant being a builder was willing to take either cash or vacant property suitable for building purposes. Defendant viewed the property but no agreement for a trade was arrived at. The name of the owner was not communicated by plaintiffs to defendant, nor was the owner's name at that time known to defendant. At this point the evidence shows that plaintiffs took the matter up with a Mr. White, but the parties could not agree upon terms, although one of the plaintiffs testified that there was only \$125 difference between them. The first of the trades above recited was declined by defendant the latter part of October, 1916, and the White offer about two weeks later. On January 14, 1917, defendant answered an advertisement by letter to "S. A. Tribune" and sent it to the office of the Chicago Tribune by mail, in which letter

he described his property, stating the price to be \$7500 and offering to trade for the advertised lots if they were suitable. It seems that the advertiser was Henry Peck, through whose advertisement and defendant's answer thereto the parties came together and the trade was made, and of which trade plaintiffs claim they were the procuring cause.

Peck was used as a witness by both sides to this litigation; they therefore vouch for his veracity. Furthermore, there is naught in the record tending in the slightest degree to impeach his testimony.

It is not claimed by plaintiffs that they brought Peck and defendant together, but they insist that owing to the circumstance that they showed defendant Peck's vacant lots for the first time, Peck is therefore their customer. Peck, however, testified that he knew defendant through his answering Peck's advertisement in the Tribune and not before. Paul E. Roegner, testifying in his own behalf, swore that after defendant declined the White trade on the terms proffered, "there was nothing else said between myself and Mr. Frey pertaining to this transaction."

Peck was a disinterested witness so far as any liability in the matter in suit is concerned, and his testimony is in harmony with the facts testified about by the other witnesses. Indeed, there is no claim that plaintiffs negotiated the trade which was finally consummated, or that the parties ever came together through any efforts of plaintiffs. Their claim for commission rests upon the mere fact that in the first instance defendant was shown the Peck lots by one of the plaintiffs.

It is patent that plaintiffs were not the procuring cause of the trade of defendant's property to the wife of the witness Peck, and as said in Stone v. Ferry,

144 Ill. App. 191, so we find - "that the efforts of plaintiff were not the effective means or procuring cause in bringing about the exchange of property." Bergman v. Swedish, etc., 169 ibid 329, is authority for the holding that while a broker may have first brought the premises sold to the attention of the ultimate purchaser, yet if such agent was not the efficient cause of making the sale, no commission is due him. Davis v. Cassette, 30 ibid 41, is also an interesting case in affirmance of such legal principle.

Plaintiffs had before the time of the trade abandoned their efforts with Leck and had negotiated with White, with whom they were alike unsuccessful.

It therefore follows that the judgment of the Municipal Court must be reversed with a judgment of nil capiat in this court, and it is so ordered.

REVERSED WITH JUDGMENT OF

NIL CAPIAT.

Mr. Justice Dever dissents.

BERZ COMPANY, a corporation,
Appellee,

vs.

PROFILES GAS LIGHT & COKE
COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 304

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This action arose from a collision between two automobiles, one of which was an ambulance. On a trial before the court there was a finding and judgment in favor of plaintiff and against defendant for \$750, and defendant appeals.

The amended statement of claim charges that plaintiff was obliged to and did lay out and expend in repairing the damage to its said motor vehicle certain sums of money, and that after the motor vehicle of plaintiff was repaired it was worth \$300 less than it was before it was damaged by the negligence and carelessness of defendant.

Otto H. Berz, a witness for plaintiff, testified that he was the owner of the ambulance; that he purchased it in the fall of 1912; that it cost in the neighborhood of \$800; that he purchased it of the Winton Company and afterwards remodeled it. The chauffeur who drove the ambulance at the time of the accident testified that he worked for the witness Berz. From this testimony it is clear that Otto H. Berz, and not the Berz Company, was the owner of the damaged ambulance. Plaintiff argues, however, that there is no pleading denying ownership in the corporation. This is true, and plaintiff, in the condition of the pleadings might have rested

its case without proving ownership, but it elected to prove that it did not own the ambulance and that Otto H. Berz did, which evidence put plaintiff out of court. It alleged that it was the owner of the ambulance and proved that Otto H. Berz was such owner.

The fundamental rule that the proof must conform to the averments of the pleadings is violated, with the result that plaintiff has failed to prove any right of recovery, as the ambulance was not its property.

While what has been said disposes of the case, we will add that on the merits it is clear that plaintiff, if it owned the ambulance, would not be entitled to recover. The chauffeurs of both parties were at fault in approaching the crossing at right angles, neither paying any attention to the other, although in view of each other for a sufficient distance in which to have stopped their respective automobiles, in the exercise of due care, in time to have averted the collision. Berz's chauffeur testified that he was going about fourteen or fifteen miles an hour; that he noticed that defendant's automobile made no attempt to slow down, and that he knew that if he went ahead there must be a collision, but that he made no effort to slow down and kept going at the same speed all the time. The evidence of the chauffeur of the ambulance establishes the fact that he was not in the exercise of ordinary care at the time of the collision, but was, on the contrary, recklessly disregarding of the danger which was imminent and visible. Chicago Union Traction Co. v. Jacobson, 217 Ill. 404.

In Smith v. Chicago General Ry. Co., 86 Ill. App. 647, the court said:

"The plaintiff saw the car coming at a high rate of speed and the legitimate inference from his pleading is that he knew he could not cross the tracks without being struck by the car, unless it should be stopped or slackened in speed, and so knowing he deliberately took the chances."

A judgment for the defendant in the Smith case was affirmed. Johnson v. Coey, 237 Ill. 88.

The parties were in pari delicto, and therefore the law will not afford either of them any relief.

The judgment of the Municipal Court is reversed with a judgment of nil capiat in this court.

REVERSED WITH JUDGMENT OF
NIL CAPIAT.

FREDERICK H. WICKETT,
Appellee,

vs.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

KATHERINE HASTINGS et al.
On Appeal of RALPH TEMPLE
and BENJAMIN F. J. ODELL.

209 I.A. 905

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court of Cook County.

The facts as gathered from the briefs of counsel are substantially as follows: On August 4, 1913, one Ralph Temple foreclosed a second mortgage on certain real estate. The property was sold under the foreclosure decree. A master's certificate was issued to Temple, the purchaser, and was assigned by him to Benjamin F. J. Odell. On May 7, 1915, the master in chancery issued a deed to the premises to Odell.

On September 14, 1914, Frederick H. Wickett filed a bill to foreclose a certain first trust deed held by him on the premises in question. Ralph Temple was named in these proceedings as defendant. Summons was issued against Temple which was returned by the Sheriff unserved. Service was had on Temple by publication, in accordance with the statute, and on January 26, 1915, a decree pro confesso was entered against him. Benjamin F. J. Odell was not made a party to these proceedings. The premises were sold by the master under a decree entered in the cause and a master's deed was issued to Frederick H. Wickett, the purchaser at the sale, on May 26, 1916; a deficiency decree was also entered in these proceedings against the makers of the first trust deed. A receiver was appointed in the proceedings and he was directed

to receive the rents and profits issuing from the premises. On the 18th day of May, 1915, Odell tendered to Wickett the sum of \$3,750, being the amount at which the premises were sold under the first trust deed, and also interest on this sum from the day of this sale to the date of the tender. Wickett, who is appellee here, refused the tender and Temple and Odell filed a petition in the Wickett foreclosing proceedings under Section 19 of the Chancery Act, to be allowed to make statutory redemption from the sale in the Wickett suit. On answer to the petition the court decreed that Odell and Temple were legally entitled to redeem the premises, and they were given this right on payment to appellee of the sum of \$3,750 together with interest from the date of the sale to the day of redemption, and also the total sum of \$273.06, expended by appellee for taxes, etc., with interest thereon from the date of the respective payments. It was further ordered by the decree that surplus rents in the hands of the receiver be paid to Wickett.

It is urged by counsel for Wickett that Odell, who was not made a party to the suit, and who claims title to the equity of redemption through an assignment of the certificate of sale from Temple, was not properly in court; that he was in no sense a party to the original proceedings to foreclose the first trust deed, and that the court was without jurisdiction to adjudicate Odell's claim as owner of the equity of redemption to the rents and profits which the record shows were collected and held by a receiver who had been appointed in the original proceedings. We do not think that appellee, Wickett, is in a position to complain of this error, if it is error. He is the appellee in this court and he seeks here to sustain the decree which found in

express terms that Odell was the owner of the equity of redemption and was entitled to redeem the property from Wickett's foreclosure sale. Appellee has not assigned cross error as against the decree or any of its provisions. In this condition of the record, we are called upon to consider only the questions raised by the assignments of error made by appellants.

It is insisted on behalf of Odell that that part of the decree awarding the rents and profits in the hands of the receiver to Wickett in payment of a deficiency decree is erroneous.

Where it appears that the rents and profits issuing out of mortgaged premises have not been pledged by the mortgage or trust deed to secure the agreements and promises of the mortgagor and where it further appears that the owner of the equity of redemption is not the person who executed such mortgage and trust deed and who is not personally legally liable for the indebtedness, such owner of the equity of redemption is entitled of right to such rents and profits.

In Stevens v. Pearson, 202 Ill. App. 29, it was the held on authority of Owsley v. Neeves, 179 Ill. App. 61, that -

"Where the rents and profits are not expressly mortgaged to secure the debt, they, during the period of redemption, belong to the owner of the equity of redemption provided he is not personally liable for the mortgage debt and there is no deficiency judgment against him."

In Schaeppi v. Bartholomae, 217 Ill. 105, the Supreme Court held that -

"By virtue of the lien created the mortgagee or cestui que trust had the right to have the security foreclosed and the property sold and the proceeds applied in payment of the secured debt. But when this has been done and the lien enforced by a sale of the property and the proceeds applied, the mortgage or trust deed has expended its force and the property is no longer subject to its

its provisions. (Citing cases.) Nor does it in any way affect the result that the holder of the secured indebtedness becomes the purchaser at the sale, whether he be the mortgagee or cestui que trust, or not. By becoming the purchaser a new relation created by the statute exists, in no wise dependent upon any privity of contract between the purchaser and mortgagor."

The record shows that one Katherine Hastings was the owner of the property in question at the time that the two trust deeds were executed. The second trust deed was foreclosed by Temple, who received a certificate of purchase at the master's sale. This certificate was assigned by Temple to Odell, who on May 7, 1915, received a deed for the premises. The execution and delivery of this deed vested in Odell all the right, title and interest to the property in question which was held by Katherine Hastings at the time the second trust deed was executed. The order appointing a receiver to collect the rents was entered May 12, 1915, and the master's deed to Wickett was issued May 26, 1916.

It is contended on behalf of appellee, Wickett, that the trust deed foreclosed by him created an equitable lien upon the rents and profits for the purpose of applying them in payment of the deficiency, and that appellant, Odell, is required to tender the full amount found due under the foreclosure of the first trust deed before he, appellant, could be said to be entitled to the rents and profits in the hands of the receiver. The first trust deed contained the usual provisions for sale of the premises and for the application of the amount received therefor, and it further provided that "any rents that may be collected after such sale and before the time of redemption expires" should be paid "to the purchaser or purchasers of said premises at such sale." It seems to be conceded that the language of

the trust deed did not in technical terms amount to a pledge of the rents and profits to secure the indebtedness, the payment of which was secured by the execution of the trust deed, but it is insisted by appellee that Odell's right of redemption was a purely equitable right and could be claimed by him only by paying all that was equitably due under the first mortgage. In support of their contentions counsel cite the case of First National Bank v. Illinois Steel Co., 174 Ill. 140, and Loughbridge v. Haugan, 79 Ill. App. 644. We have examined these cases and do not find that they support the position taken by appellee. In both cases the trust deeds in express terms provided for the appointment of a receiver, the collection of rents and their application to any deficiency found to exist after sale of the premises. It is not contended here that the lien which appellee seeks was created by express language, and the decree which appellee seeks to sustain expressly finds that the rents, profits and issues of the premises foreclosed were not pledged as security for the debts secured by the first trust deed. What has been said of the cases above referred to is also applicable to the case of Lechner v. Green, 104 Ill. App. 443.

No privity of contract existed between appellant Odell and Wickett at any time. Odell's right and interest in the premises became definitely fixed when he obtained the master's deed under the foreclosure of the second mortgage. He was bound with knowledge of appellee's rights under the first trust deed. This trust deed did not create a lien in the rents and profits accruing after the sale under foreclosure of the first trust deed in behalf of

appellee. We think that the language of the trust deed above quoted is too uncertain and vague to authorize a holding that the rents and profits in the hands of the receiver should be applied in payment of the deficiency decree. Nor do we think that there is merit in the contention that the familiar principle that he who seeks relief in a court of equity must come prepared to do equity, has application to the facts of the case. The law gave to the owner of the equity of redemption the legal right to redeem the premises on payment of the sum of money which constituted a lien upon such premises. Odell was bound with knowledge of the fact that his interest in the premises was subject to all the rights of the holder of the first trust deed, and nothing more than that. As against the property, such holder's rights consisted of enforcing its sale to pay the mortgage indebtedness and having done so his relation to and interest in the property, so far as rights accruing under the trust deed are concerned, were terminated. (Rawson v. Bethesda Baptist Church, 221 Ill. 220.)

The decree found that the rents, issues and profits of the premises were not pledged as security for the debts secured by the trust deed, and it erroneously ordered and directed that the surplus of such rents, above certain items paid by and allowed to the receiver, should be applied in payment of the deficiency decree.

It is also insisted on the part of Odell, appellant, that the trial court erred in ordering and decreeing that Odell was to be charged interest on the sums for which the premises were sold, \$3,750, from the date of the sale to the date of redemption. We are unable to agree with counsel for appellant on this proposition.

It is true that appellant tendered to appellee the full amount for which the property was sold, together with interest on such amount. This tender was made on the 18th day of May, 1916. The decree finds that subsequent to the sale under the first trust deed foreclosure Wickett, appellee, had paid taxes upon the premises in the total sum of \$273.06, the last payment of which was made on May 15, 1916, before the tender made by appellant. No point is made by appellant that the decree directing the receiver to turn over, out of the rents and profits in his hands, the sum so paid for taxes with interest thereon, is erroneous. Wickett was the purchaser at the master's sale under the foreclosure of the first trust deed and he received a master's deed to the premises. He was authorized to pay these taxes, and we think that on the record here the tender should have been for the amount so paid in addition to the amount tendered by appellant Odell. In the petition filed by appellants it is alleged that they "tendered in court the amount for which the property was sold together with interest thereon from the date of sale to date, and offered to make tender also for any deficiency by reason of miscalculation, etc." The petition in effect waives the point made here by appellants that Odell should be charged with interest up to the day of tender only in that the right claimed here was not asserted therein.

The decree of the Circuit Court will be reversed and the cause remanded with instructions to enter a decree in accordance with the views herein expressed.

DECREE REVERSED AND CAUSE REMANDED.

W. Schacht

121 - 23461

FIRESTONE TIRE & RUBBER COMPANY,
a corporation,

Defendant in Error,

vs.

SAUL I. GINSBURG,
Plaintiff in Error.

ERROR TO SUPERIOR COURT
OF COOK COUNTY.

209 I.A. 208

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a judgment in the Superior Court in favor of the plaintiff for the sum of \$9,091.66.

The declaration filed by plaintiff consists of the common counts and two special counts and was supported by an affidavit of claim. The first special count declared upon a note for the sum of \$5,000, dated October 16, 1911, due four months after date, payable to the order of Grabowsky Power Wagon Company. The second special count declared upon a note for the sum of \$5,000, dated February 1, 1912, due 60 days after date. Saul I. Ginsburg was the maker of both notes and they were endorsed by the payee named therein, Grabowsky Power Wagon Company. An affidavit of claim was filed with the declaration in which it was stated that there was due to plaintiff on the notes the sum of \$8,329.50. The suit was begun on November 6, 1912, and on December 2, 1912, the defendant filed pleas consisting of the general issue and two special pleas and also an affidavit of merits in support of the pleas. On September 24, 1914, the affidavit of merits and the pleas were stricken from the files and the defendant was given leave to file an amended affidavit of merits and amended pleas within 15 days.

On October 9, 1914, the court denied defendant leave to file pleas and an affidavit of merits which he presented the court, but he was given leave to present an affidavit of merits and pleas by October 10, 1914. No pleas or affidavit of merits were presented on October 10th. On October 14, 1914, the court again denied defendant leave to file amended pleas and amended affidavit of merits. The pleas which were presented were marked and initialed by the court for identification, and defendant was then given leave to present further amended pleas and affidavit of merits by October 19th, on which date the defendant presented the same pleas which had been presented on October 14th. Leave was given to the plaintiff to file these amended pleas and affidavit of merits, and the court immediately thereafter, on motion of the plaintiff, struck the amended pleas and affidavit of merits from the files and entered default against the defendant for want of pleas. Evidence was then heard by the court and a judgment entered in favor of the plaintiff. An appeal from this judgment was prayed for and allowed. The appeal was not perfected. On the 27th of June, 1917, this writ of error was sued out for the purpose of reviewing the judgment.

We do not think it necessary to determine the question whether the court erred in striking from the files the pleas filed by the defendant on Dec. 2, 1912. The record shows that on said date the defendant obtained leave to file amended pleas and such amended pleas and an amended affidavit of merits were subsequently filed.

In Culver v. Johnson, 90 Ill. 92, the Supreme Court said:

"If appellant had intended to rely on that affidavit he should have stood by it, but by filing the second or amended affidavit he waived the first, and relied wholly on the second. He was not bound to observe the rule entered requiring him to file this second affidavit, but, having undertaken to comply with the rule, it was incum-

bent on him to show he had a meritorious defense to the alleged cause of action."

While we are not clear as to just what is meant by the leave granted by the trial court to defendant to present his amended pleas and affidavit of merits, the record does show that finally on October 19, 1914, the defendant obtained leave to and that he did on that day file amended pleas and an amended affidavit of merits which were stricken from the files.

As we view the record in the case we are called upon to determine the correctness of the rulings of the court entered of record on October 19, 1914. Notwithstanding the rules of this court, and the frequency with which the requirements of such rules have been referred to in opinions, we are again compelled to say that the judgment of the trial court must be affirmed for the reason that there has been no serious effort made to comply with Rule 18, which provides that abstracts of record must contain abstracts of the pleadings in cases which are brought to this court for review. By referring to the record we have ascertained that the plaintiff's declaration consists of the common counts and two special counts. The abstract of record merely asserts that the declaration is upon two promissory notes. It does not appear from the abstract of record what sum the declaration alleged was due and unpaid on the notes, nor has any attempt been made to abstract the affidavit of claim filed in support of the declaration. Being unable, as we are, to determine from the abstract of record what issues really were presented by the declaration, it is impossible for us to determine whether the special pleas and the affidavit in support thereof did or did not present a defense to the case presented by the declaration.

Again, the bill of exceptions which has been made a part of the record does not show upon what grounds the trial court struck the pleas from the files.

In Consolidated Coal Co. v. Peers, 156 Ill.,

361, the Supreme Court said:

"There are some circumstances under which the court may properly strike a plea from the files, and this even when it presents a good defense to the action; and therefore, when the record does not show upon what ground the action of the court was based, it will be presumed, in favor of the ruling of the court, that sufficient cause to justify its action was made to appear."

and in Fanning et al. v. Russell, 81 Ill. 398, the Supreme Court held that the action of a trial court in striking pleas from the files would not be reviewed where the evidence upon which such action was taken was not presented by bill of exceptions.

The judgment of the trial court should be affirmed for failure on the part of defendant to comply with the rules of this court and also because he has failed to properly preserve by bill of exceptions the ruling of the trial court which he complains of. Spradling v. Russell, 100 Ill. 822.

On December 2, 1912, defendant filed, with other pleas, a plea of the general issue. This plea went to the common counts as well as the special counts filed in the suit. This plea was stricken from the files, and on leave of court, the defendant again plead to the declaration by filing two special pleas only. These pleas with two affidavits of merits, one in support of each plea, were stricken from the files. Whether this action of the court was erroneous or not, the record shows that at the time the defendant was defaulted no plea had been filed to the common counts. The notes which were sued on were offered in evidence and judgment could have been taken upon the common counts irrespective of the special counts. Obviously, the special pleas were not to the common counts. At the time default

was entered no plea was on file which purported to meet these counts, and this being so, it was the duty of the court under the circumstances to enter default of the defendant. But aside from this question, we are of opinion that the action of the trial court in striking the two affidavits of merits filed by defendant October 19, 1914, was not error. Our attention has not been called to any decided case which authorizes the practice of filing more than one affidavit of merits in support of pleas to a declaration, and we think it is obvious that such practice is not allowable. In the instant case, each of the two affidavits filed by defendant set up a different defense to a part of the claim of the plaintiff.

The affidavit attached to the first plea sets up in substance that the note dated October 16, 1911, and set up in the first special count, was delivered to Grabowsky Power Wagon Co., without consideration and as accommodation and was assigned by it to the plaintiff; that the second note dated February 1, 1912, was given to the company by the defendant also as an accommodation note and without consideration and for the purpose of renewing the note dated October 16, 1911, and that the second note was received by the company, and by it endorsed to the plaintiff, who in turn received it in payment and full satisfaction of the note dated October 16, 1911. This affidavit, and the plea which it supported, merely set up a defense to one special count of the declaration.

Another plea, supported by another and different affidavit, purported to present a defense to a part of the claim made by plaintiff in the second special count. We think the court acted correctly in striking these affidavits of merits from the files. Considered separately, neither

affidavit purports to be in support of any plea which either by confession or avoidance meets all the material allegations of the declarations. As heretofore stated, the common counts which were filed have not been met by any plea whatsoever.

Section 55 of the Practice Act - Rurd's Statutes, 1915--1916, provides in substance that in certain cases a defendant or his agent shall file an affidavit to the effect that the defendant has a good defense to the suit brought by plaintiff upon the merits to the whole or a portion of the plaintiff's demand "and specifying the nature of such defense." We think this statute contemplates the filing of but one affidavit in support of pleas to a declaration. It was the evident intention of the legislature to require parties to an action founded upon a contract to state both the claim of the plaintiff and the defense of the defendant in single affidavits, to the end that the merits of each controversy might be readily determined from an examination of such affidavits and to avoid delays which, in earlier times had resulted from an adherence to the technical rules applicable to common law proceedings.

We think also that there is much force in the contention of plaintiff that the affidavits are otherwise insufficient. It is asserted therein that the plaintiff accepted one of the notes in satisfaction and payment of the other with knowledge of the fact that both notes were given to the payee mentioned therein without consideration. With reference to the latter fact it may be said, even if plaintiff had received the notes with knowledge that they were given as accommodation papers, knowledge of this fact

alone on the part of the plaintiff would not defeat his action. The statement that he received the second note from the payee named in the note in payment of the first note, may be regarded as a conclusion of the pleader. The defendant was given ample opportunity to set up such defense as he might have had to the action brought by the plaintiff. The affidavits of merits filed October 19, 1914, were properly stricken from the files. This left the pleas then on file unsupported by affidavits, and this being so, the court properly struck the pleas from the files.

The judgment of the Superior Court will be affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,)

vs.)

OTTILIA BISHOP,
Plaintiff in Error.)

ERROR TO MUNICIPAL COURT
OF CHICAGO.

209 I.A. 309

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

On a trial in the Municipal Court of Chicago the defendant, Ottilia Bishop, was found guilty and fined the sum of \$25.00 and costs of suit for a violation of Section 180 of the Criminal Code of Illinois, and defendant brings the case here by writ of error for review.

The charge in the information filed in the cause in substance is that the defendant on the 16th day of March, 1917, in violation of the Criminal Code did unlawfully, by lottery dispose of personal property, to-wit: merchandise of the value of ten dollars (\$10.00) to one Mrs. William Treato, "whereby the said chance was made an additional inducement to the disposal of such property, contrary to the form of the statute," etc.

The evidence heard on the trial shows that the defendant was engaged under the name of "Garfield Art Shop," in selling and disposing of merchandise consisting of china, cut glass, ladies' waists, etc., on what was called the pre-installment plan." Under this plan clubs were organized by the defendant consisting of 50 members each. Originally, and for some considerable time before the arrest, the defendant's practice was to enter into a contract with each member of the clubs, a copy of which original contract is as follows:

"THE GARFIELD ART SHOP.

The Garfield Art Shop agrees to deliver to the undersigned member any piece or set of cut glass, hand painted china, linen or silverware on exhibition in the Garfield Art Shop to the value of ten dollars, upon payment of ten dollars in weekly installments of 25 cents. Each week, one member shall be selected by the proprietors of the Garfield Art Shop in such manner as they deem best, who will receive his or her choice of articles above, and be thereafter released from further payment. Four weeks arrears causes agreement to forfeit; no money refunded on lapsed agreement.

I hereby accept above terms and agree to return this contract on receipt of merchandise.

Dated this _____ day of _____ 191_____.

Signed _____

NOT TRANSFERABLE."

About March 1st, 1917, the defendant and others engaged in like business were notified by the Police Department of Chicago that this contract constituted a violation of the law, and thereafter the defendant issued to the members of the clubs, in lieu of the original contract, a new contract, which is as follows:

"CONTRACT.

Garfield Art Shop.

Agrees to deliver to the undersigned any article or articles of merchandise in their store to the value of ten dollars, upon the payment of said ten dollars in pre-installments of twenty-five cents per week, for a period of forty weeks. I hereby agree to return this contract upon the receipt of merchandise.

Dated this _____ day of _____ 191_____.

Not transferable."

The evidence further shows that a club drawing was held each week, at which, in some manner not definitely shown by the evidence, one member of the club was selected to receive from defendant ten dollars worth of such merchandise as the member might select.

It is conceded that the original contract was unlawful in that it constituted a violation of the criminal law against lotteries, but it is urged by defendant that the contract which was substituted therefor rendered the transaction legal. It is also contended that the court erred in

admitting the original contract in evidence. The theory of the prosecution is that the new contract was merely colorable and a subterfuge for what was inherently a lottery transaction.

It is conceded that certain amounts paid upon the original contract were endorsed upon the new contract, and the issue is not whether the new contract upon its face is legal or illegal. We are not inclined to hold under the authorities cited by counsel for defendant that the new contract was, upon its face, illegal. The original contract was, however, material and relevant to the issue upon which the case was actually tried. The information does not charge that the new contract was illegal. The allegation is that the defendant unlawfully engaged in a lottery transaction, and it was for the purpose of showing that she was so engaged that the original contract was admitted in evidence; it was proper to show that the conduct of the parties constituted in fact a violation of the law, notwithstanding that the formal written contract was legal upon its face.

It was held in Webster v. Sturges, 7 Ill. App. 560, that parties who had entered into an illegal and void contract were not prohibited by law from entering into another contract in relation to the same subject matter, but that the new contract should in no sense be a continuation or modification of the old, and that where the results of the illegal and void contract became incorporated into and formed a part of the consideration of the new contract, such new contract would be invalidated thereby. This authority is peculiarly applicable to the present case.

Mrs. Freeto, named in the information, testified that when she became a club member she signed the original form of contract under which payments for \$10.00 worth of

merchandise would cease so soon as she became a winner at any of the weekly drawings; that without any explanation to her the defendant took from her this contract and gave her one of the new forms; that thereafter, and when she had paid to defendant \$7.50, she was notified that she had won; that she went to defendant's place of business, selected merchandise, and did not thereafter pay, nor was she requested or required to pay any balance which she would have been required to pay had the new contract been enforced by defendant in good faith.

Inspectors for the City of Chicago testified that certain admissions were made by defendant at the time of her arrest, which, if made, tended to show her guilt of the offense charged. It is urged that this testimony should be disregarded. The evidence of these inspectors, who caused the arrest of defendant, standing alone might well be regarded as insufficient to warrant a finding of guilty in the case. This evidence is, however, strongly supported by facts and circumstances that do not appear to be in dispute, and it may be fairly inferred from the testimony of defendant given on cross-examination that she by her conduct had led club members to believe that payments would not be required of them after they had received merchandise as a result of the weekly drawings.

The judgment of the Municipal Court will be affirmed.

JUDGMENT AFFIRMED.

GEORGE W. DINGMAN,
Appellee,

vs.

LAWRENCE P. BOYLE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 311

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Plaintiff recovered a judgment in the Municipal Court against the defendant for the sum of \$1,500, and the defendant brings the case here by appeal for review.

In a statement of claim filed in the suit by the plaintiff he alleged that defendant was indebted to him in the sum of \$1,500 for services rendered to defendant on or about October 10, 1915, in connection with a proposed sale and exchange of certain real estate.

In an affidavit of merits the defendant asserted in substance that he was not liable to the plaintiff in any sum for the reasons: first, that the alleged contract with the plaintiff was unenforceable in that the plaintiff had failed to procure a broker's license to engage in a real estate brokerage business as required by ordinances of the City of Chicago; second, that the writing sued upon was not the contract of defendant; third, that the plaintiff had failed to procure for defendant a loan of \$16,000, in violation of a promise which was a material part of plaintiff's contract with defendant; and, fourth, that plaintiff had failed to procure "any person to enter into a valid and enforceable contract for the exchange of properties with defendant."

The evidence heard on the trial shows that the

defendant had entered into a contract for the sale and exchange of certain real estate with the trustees of the estate of George A. Springer, deceased. The plaintiff was not directly a party to this contract. It is insisted by defendant that plaintiff wrote into the contract, some time after its execution and without the knowledge and consent of the parties thereto, the sentence following - "Lawrence P. Boyle agrees to pay a brokerage commission of \$1,500.00 to Geo. W. Dingman," - and the controversy concerns the effect to be given to this alleged interpolated sentence. The plaintiff testified that this insertion was made in the contract on the date of its execution. There is a direct contradiction between plaintiff and defendant as to when, and the circumstances under which, this writing was made. There is evidence in the record in support of the contention of each party, and we are not in a position to say that the plaintiff testified falsely or mistakenly when he said that the writing was inserted in the contract in the presence and at the dictation of the defendant.

It is insisted that the judgment in plaintiff's favor should be reversed for the reason that the plaintiff had not procured from the City of Chicago a license to conduct a real estate brokerage business. Plaintiff testified that at the time, and for a few months before he entered into his agreement with defendant, he had not been engaged in a real estate brokerage business; that he had been employed by the Springers, who were engaged in the real estate business, to aid them in selling real estate. This fact does not by any means tend to prove that he was conducting a real estate brokerage business. He does not appear to have had any particular place of business, and from the whole evidence we think the trial court was right in concluding that plain-

tiff was not engaged in such business, and that he was entitled to receive compensation from defendant under a special contract, notwithstanding his failure to qualify as a licensed broker.

In O'Neill v. Sinclair, 153 Ill. 524, the Supreme Court held that, a failure to procure a license under the terms of the ordinance in question would not prevent a plaintiff from recovering under a special contract to procure a purchaser for real estate, and that the ordinance required the licensing of persons engaged in real estate brokerage business as an occupation.

It is also asserted that in violation of his promise, the plaintiff had failed to procure a person ready, willing and able to enter into an enforceable contract for the sale or exchange of defendant's real estate. The evidence shows that the contract, which was never consummated, was executed by the parties thereto in the manner following:

"Edward L. Springer,	(Seal)
Frank G. Springer,	(Seal)
Ada E. Springer,	(Seal)
Simeon Loudenback	(Seal)
{As Trustees under the will	
{of George A. Springer,	
{Deceased.)	
Lawrence P. Boyle,	(Seal)."

A certified copy of the will of George A. Springer, deceased, was introduced in evidence. The name of Charles W. Springer appears in the will as one of the trustees. His name does not appear among the signers of the contract. Simeon Loudenback signed the contract as a trustee of the estate. Edward L. Springer testified on the hearing that he knew the persons who signed the contract and that they were trustees of the estate of George A. Springer,

deceased. This evidence does not appear to have been objected to. The will provided that, "in case of death, resignation or refusal to act of either of my said trustees before named I direct that * * * Simeon Loudenback shall be the trustee in his or her stead." In deciding this point it should be borne in mind that the controversy is not between the trustees and the defendant. The evidence tends to show that the defendant asserted his willingness at all times to comply with the contract which he had entered into with the trustees. We think the testimony of the trustee who asserted that Loudenback was one of the trustees should in view of the provisions of the will above quoted, be regarded as sufficient to warrant the conclusion of the trial court that the contract was properly executed by the trustees, and we do not believe that the contention that the plaintiff did not procure a person ready, willing and able to exchange properties with defendant is well founded.

A point is made by defendant that, as a condition precedent to plaintiff's right to commission, he, plaintiff, was compelled to show that he had performed the terms and conditions of the following writing:

"Chicago, June 5, 1916. In consideration of your signing the contract between the Springer estate and yourself, I agree to negotiate and secure for you a loan of two thousand dollars (\$2000.00) on each of the eight (8) houses included in the said Springer contract, and if I fail to do so, the contract between the Springers and you, and which is to be held by me, will at your option be null and void, and I shall not be entitled to any commissions from you for negotiating the said Springer contract. (Signed) George W. Dingman, Agent for Springer estate. Dingman promises to take the eight houses for sale at \$26,000.00 net and pay all expenses provided I wish him to do so. C. K. G. W. Dingman."

The evidence taken on this point is also contradictory. Plaintiff insists that he was ready, able and willing to procure the loan referred to; that he in fact had caused an application for a loan to be presented to defendant, but that defendant, without any justifiable reason, refused to make or sign any such application. On the other hand, defendant testified that he was ready to borrow the money and that plaintiff had failed to procure a person who was willing to make the necessary loan. The trial court had an opportunity to see the witnesses and hear their testimony, and was in a much better position to determine the question than are we.

Other questions are argued by defendant, as to which we think no reversible error was committed by the trial court.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

GERALDINE B. EDLUND,
Defendant in Error.

vs.

ARTHUR E. EDLUND,
Plaintiff in Error.

ERROR TO CIRCUIT COURT
OF COOK COUNTY.

209 I.A. 312

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review a decree of the Circuit Court.

In the bill filed in the trial court it is alleged that complainant was the lawful wife of the defendant, Arthur E. Edlund, and that defendant had been guilty of extreme and repeated cruelty toward complainant. In the prayer to the bill the complainant sought a dissolution of the marriage and temporary and permanent alimony.

An examination of the record filed here discloses that the evidence introduced upon the trial was not preserved by complainant by a certificate of evidence nor in any other manner. The cause was tried before a jury which returned a verdict in favor of the complainant on the issue of whether defendant had been guilty of extreme and repeated cruelty toward her, and the decree entered concludes as follows:

"And the court having heard the evidence subsequently presented on the question of alimony in said cause, and on the question of solicitor's fees, and having heard the arguments of counsel, and being fully advised in the premises, doth order, adjudge and decree, that the defendant, Arthur E. Edlund, pay to the complainant, Geraldine B. Edlund, the sum of twelve (\$12) dollars per week, as permanent alimony herein, beginning on May 26, 1917, and that the defendant, Arthur E. Edlund, pay to the complainant, Geraldine B. Edlund, the sum of four hundred (\$400) dollars, as and for her solicitor's fees, herein, within thirty (30) days from the date of this decree."

Whether the evidence heard by the court on the question of alimony was sufficient to support the decree of the court cannot be determined from the record here. No specific finding of facts appears to have been made by the court other than as indicated above. In this state of the record the decree must be reversed.

In Berg v. Berg, 223 Ill. 209, the court said:

"In chancery cases the practice is well settled in this state that the party in whose favor a decree granting relief is entered, to maintain it must in some way preserve the evidence, by a certificate of evidence or otherwise, or the decree must find the specific facts that were proven on the hearing, and that it is not the duty of the party against whom the decree is rendered thus to preserve the evidence. No presumption will be entertained that evidence sufficient to sustain the decree, not appearing in the record, was heard, and if the evidence is not thus properly preserved the decree will be reversed upon appeal."

Whether the evidence heard by the jury and the court justified the decree which was entered in the cause cannot be determined from this record. The defendant had a legal right to have the decree of the trial court reviewed and the authorities are clear that the legal duty rests upon the party in whose favor a decree in a court of chancery is entered to preserve in some manner the evidence upon which such decree is based. Ohman v. Ohman, 233 Ill. 632.

An order was entered in the cause on October 21, 1915, allowing temporary alimony to complainant. Three affidavits in opposition to the motion were filed by defendant. These affidavits were not, however, made a part of the record by the signing of a certificate of evidence, and as the order is otherwise without support in the record the order of October 21, 1915, must be reversed.

No objection is urged against the validity of

that part of the decree which grants a divorce to complainant, and that part of the decree will be affirmed. That part of the decree of June 9, 1917, which awards permanent alimony to complainant will be reversed and the cause remanded.

DECREE AFFIRMED IN PART AND REVERSED
IN PART.
ORDER OF OCTOBER 21, 1915, IS REVERSED.
CAUSE IS REMANDED.

the first of these is the fact that the
the second is the fact that the
the third is the fact that the
the fourth is the fact that the

WILLIAM N. JUNKER,
Appellee,

vs.

FIDELITY & DEPOSIT COMPANY
OF MARYLAND, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

2091A 3103

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

William N. Junker, plaintiff, recovered a judgment in the Municipal Court for the sum of \$23.45 against the Fidelity & Deposit Company of Maryland, a corporation doing an insurance business, and the defendant corporation brings the case here by appeal for review.

On April 13, 1916, the defendant issued an accident insurance policy to the plaintiff which contained, among other provisions, the following:

"In consideration of the representations and agreements contained in the application for this policy, a copy of which is endorsed hereon, and made a part hereof, and of the premium of Seventy-four Dollars and Twenty-five Cents, does hereby issue, subject to all the provisions, limitations and conditions herein contained or endorsed hereon," etc.

"STANDARD PROVISIONS.

"Cancellation by the company. 16. The company may cancel this policy at any time by written notice delivered to the insured or mailed to his last address, as shown by the records of the company, together with cash or the company's check for the unearned portion of the premiums actually paid by the insured, and such cancellation shall be without prejudice to any claim originating prior thereto."

The case was tried on a stipulated statement of facts, from which it appears, among other things, that the plaintiff paid as total premium on the policy the sum of \$74.25; that on August 2, 1916, the defendant cancelled the policy, notifying the plaintiff of its action by letter and enclosing therein its check for \$51.46.

On the trial the defendant submitted to the court to be held as a proposition of law the following:

"If the court finds that upon the cancellation of the policy by the defendant corporation, notice of cancellation, together with the defendant corporation's check for the unearned portion of the premium actually paid by the insured, was mailed to the insured and received by him, then the court's finding must be for the defendant."

The court refused to hold the above as a proposition of law applicable to the case, and judgment was entered in favor of the plaintiff.

It is expressly provided in the policy that the defendant had the right to cancel "at any time by written notice delivered to the insured * * * together with cash or the company's check for the unearned portion of the premiums actually paid by the insured and such cancellation shall be without prejudice to any claim originating prior thereto."

The appeal from this judgment is undefended. The policy was cancelled on August 2, 1916, and it is not denied in the stipulation of facts or otherwise that the defendant paid to plaintiff all of the unearned portion of the premiums which he had paid to it.

Where a policy of insurance provides, unconditionally, that the insurer may cancel the policy at any time upon giving notice, and where nothing is provided therein as to the return of unearned premium, the authorities are not in accord as to whether such unearned premium must be returned to the insured before an attempted cancellation of the policy can be made effective. The Supreme Court of this state has held that under such circumstances "it is incumbent on the insurance company to pay or tender to the policy holder the unearned premium."

506. But where, as in the instant case, the policy provides that the insurer may cancel the policy at any time it may see fit to do so on a return to the insured of the unearned portion of the premium, and where it appears, as it does here, that such unearned premium was returned on cancellation of the policy, the insured has no legal right to a return of that part of the premium which represents payment for a period of time during which he was furnished the protection provided by the policy.

We think the proposition of law submitted to the trial court should have been held as a proposition applicable to the facts of the case and that the judgment should be reversed and judgment of nil capiat entered in this court.

REVERSED AND JUDGMENT OF

NIL CAPIAT HERE.

248 - 23593

GEORGE C. BOUR,
Appellant,

vs.

WALTER W. COOK,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 313

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

In this case the judgment of the Municipal Court was in favor of the defendant, and the plaintiff brings the case here by appeal for review.

In direct violation of the rules of this court, the plaintiff has failed to abstract in the abstract of record the pleadings filed in the trial court. We are not permitted to examine the record for the purpose of determining what issues were presented to the trial court, and, if for no other reason, the judgment should be affirmed for failure on the part of the appellant to comply with the rules of this court. We have, however, examined the brief filed by appellant and we are unable to say that the trial court was not justified in entering judgment in favor of the defendant.

The plaintiff is a real estate broker and his suit is for commission which he claims is due him from the defendant as the result of plaintiff's efforts to procure a purchaser for certain premises owned by defendant. The premises in question were sold to one Mrs. B. F. Mohr October 29, 1916.

On June 15, 1916, the defendant wrote to plaintiff as follows:

"This is to confirm our oral agreement concerning your acting as agent for sale of my house at 6917 Bennett avenue, Chicago. It is understood that you are to have the exclusive agency for a period of 90 days from June first, receiving the usual commission in case the same is made. Any time after termination of 90 days I to have option of terminating the exclusive character of your agency. In case some other agent brings a customer for the house and makes a sale you are to divide the commission equally with him."

On August 31, 1916, defendant delivered to plaintiff the letter following:

"Chicago, August 31, 1916.

Messrs. George C. Bour & Co.,
Chicago, Illinois.
Gentlemen:

The ninety day period, during which you were to have the exclusive agency for my house at 6917 Bennett Avenue, is up today. In accordance with our understanding, I hereby terminate the exclusive character of your agency by placing the house in the hands of Mr. T. D. O'Hern of Hoff and Company. I shall be glad to list the house with you also in accordance with our understanding.

Very truly yours,
(Signed) W. W. Cook."

It is true, as said, that plaintiff's agency to sell the premises was continued after the date of the last above mentioned letter, but there can be small doubt from an examination of the two letters that the defendant explicitly notified plaintiff of defendant's election to terminate the exclusive agency and that defendant had listed his property for sale with other agents. It is not denied that the defendant did list his property with the brokerage firm of C. W. Hoff & Co., which company placed a "For Sale" sign on the premises, and the principal dispute seems to be whether the plaintiff or C. W. Hoff & Co. was the procuring cause of the sale of the property.

The evidence tends to show that the plaintiff's agent showed the premises to Mrs. Mohr sometime in August, 1916, and that she refused to purchase them at the price then asked for them by defendant.

While it is clear that the plaintiff discussed

with Mrs. Mohr a proposition for the sale of the property in August, 1916, it is also apparent that nothing came of this effort on the part of plaintiff to sell the premises. The evidence does show that Mrs. Mohr, in the latter part of October, took up with both the plaintiff and C. W. Hoff & Co. the question of a purchase of the property, and that the sale was actually consummated through the efforts of C. W. Hoff & Co. Declarations were submitted at the trial from which the court could conclude that the defendant had expressly informed plaintiff that any effort on his part to sell the premises was to be subject to confirmation by the defendant.

On the whole evidence, we think that the trial court had before it sufficient evidence to authorize its finding that C. W. Hoff & Co. was the procuring cause of the sale of the property to Mrs. Mohr. Mrs. Mohr endeavored to purchase the premises through the agency of both brokers, and the conclusion reached by the trial court upon the controverted question of facts finds some support in the evidence. It is true, as contended, that a broker earns his commission when he produces a purchaser who is ready, able and willing to buy upon the terms stated by the owner; Wilson v. Mason, 158 Ill. 304; but we cannot say, from the evidence submitted on the trial, as a matter of law, that the purchase of the premises in question was in fact procured through the efforts of plaintiff.

The judgment of the Municipal Court is affirmed.

JUDGMENT AFFIRMED.

MOSES C. MYERS,
Defendant in Error.

vs.

KATHERINE MAY ANDREWS,
Plaintiff in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

209 I.A. 116

MR. JUSTICE McSWEENEY DELIVERED THE OPINION OF THE COURT.

By this writ of error defendant seeks to have reversed a judgment against her upon verdict for \$4,502.45. Plaintiff's claim was based on a contract with the defendant whereby he was to give his services in assisting defendant to recover on a claim under what is called a grub stake agreement between her and her husband. The question between plaintiff and defendant is as to who is chargeable under their contract with the expenses incurred by plaintiff in his activities in assisting defendant. He asserts that the defendant should reimburse him for these advances, while she contends that she was to be at no expense in the matter.

At the date of the so-called grub stake agreement,, January 31, 1898, defendant's name was Katherine May Elliott and she was the wife of H. C. Elliott, who died December 30, 1909. Subsequently, and before the commencement of this suit, she married a man named Andrews.

The contract referred to reads as follows:

"Know all men by these presents, that I, H. C. Elliott, hereby bequeath to my wife, Katherine May Elliott, all my earthly possessions that I now possess or shall possess, and that this my last will and testament shall take effect immediately after my death. Also that she shall act as sole executrix without bonds, also that she shall have the entire amount of life insurance, also that in case I return from Alaska whatever riches I possess she shall have 50 per cent. of same to do with in her own right as she may see fit, in consideration of \$400.00 Four Hundred Dollars, given me in cash to make trip to Alaska.

H. C. ELLIOTT.

Chicago, January 31, 1898."

On January 24, 1906, Mrs. Elliott entered into the contract with plaintiff which has given rise to the present controversy. At the instance of plaintiff's attorneys three documents were prepared and were executed to evidence this agreement. These are in substance as follows: The first recites the agreement between H. C. Elliott and Mrs. Elliott, and an assignment and transfer by Mrs. Elliott to the plaintiff of a one-half interest "in and to said claim, and in and to all moneys, properties and securities to be recovered thereby," the consideration paid by Myers to Katherine May Elliott being \$10, and as a further consideration Myers agreed to use his best efforts to realize upon said claim, either by litigation or compromise, "but all the costs and expenses which the said Moses C. Myers shall incur in and about so doing shall be paid by the said Katherine May Elliott. If, however, any sum of money shall be realized as the result of the enforcement of the above mentioned claim, then one-half of the expenses thereof shall be taken out of the one-half of the proceeds of enforcement coming to said Moses C. Myers, by virtue of his ownership of an undivided one-half interest therein." There was also a recital of a delivery to Myers of a power of attorney authorizing him to represent Mrs. Elliott.

The second document, after reciting the grub stake contract between Elliott and his wife, appoints Myers as the attorney in fact for Mrs. Elliott, with full power to take all lawful measures to enforce her rights under the contract with Elliott, with the usual powers of attorney contained in the ordinary form of power of attorney.

In the third document Katherine Elliott, after referring to and reciting the terms of the grub stake contract with her husband, assigns and transfers by apt words

to Moses C. Myers an undivided one-half of her claim against H. C. Elliott, and any real or personal property, and a full undivided one-half title, estate and interest in and to any and all moneys, securities, real or personal property "to which I may be entitled, or which may be recoverable by reason of such claim," giving to the "said Moses C. Myers, his executors, administrators and assigns full power and authority, for his or their own use and benefit, but at his or their own cost, to take all legal measures which may be proper or necessary for the complete recovery of said assigned claim."

These documents were all dated and executed at the same time, and although each of them recited a consideration of \$10, the evidence shows that only one \$10 was paid by Myers to the defendant. While reasons are presented with plausibility why the agreement of the parties was incorporated in these three documents, they embody essentially the simple agreement of Myers to undertake to recover for the defendant on account of her contract with Elliott, for which Myers was to receive one-half of whatever was recovered.

It is argued with force that the contract lacks mutuality in that it is unfair to the defendant, and that the trial court was in error in striking from the defendant's affidavit of merits this defense. We are not of the opinion that this was error, for while the contract may be one-sided and unfair, yet it does not necessarily lack mutuality. In addition to the monetary consideration, which may have been nominal, plaintiff undertook to give his services.

A more serious point is the action of the trial court in refusing to permit the defendant to introduce testimony showing as a fact what the contract really was with ref-

erence to the understanding as to who should be chargeable with the expenses. Defendant asserted in her affidavit of merits that such parol evidence would show that the real agreement was that Myers should pay all the expenses, but the provision that she should pay them was incorporated for the reason that to have it appear Myers should pay them would make the contract champertous upon its face, and hence void. Both counsel have argued at length the alleged champertous character of the contract, defendant contending that parol evidence is admissible to show the illegal character of a contract.

We do not deem it necessary to decide whether or not this contract can be called champertous and hence void, for the reason we are of the opinion that a surer ground for the admission of parol testimony is found in an ambiguity in the contract with reference to the matter of expenses. By referring to the contracts above outlined it will be seen that while in one of the contracts it was provided that Mrs. Elliott was to repay all costs and expenses, yet in another document which we have construed to be part of the same agreement, all such expenses were to be at the charge of Myers. In view of this latter provision it was, in our opinion, entirely competent for the defendant to show why an apparent contrary provision was inserted. Whether or not the reason of fear of champerty was a sufficient reason for the provision imposing the expenses on her is of no importance; she should have been permitted to tell all the circumstances of the transaction for the purpose of clearing up, if possible, the ambiguity and uncertainty appearing upon the face of the document. If she

were able to produce testimony that the contract in fact was that all expenses were to be upon Myers and not upon her, and the jury should believe such testimony, it would follow that there could be no recovery by the plaintiff in this case, regardless of whether or not the contract was champertous. In striking this defense from the affidavit of merits and in holding incompetent defendant's parol testimony upon this point we are of the opinion that the trial court committed reversible error. It was also reversible error upon the same ground for the court to strike out paragraph 13 of the affidavit of defense, which sets forth that the real agreement was that the defendant was not to be bound to repay any sum of money whatsoever to the plaintiff.

Counsel devote considerable attention to the proof as to how far plaintiff performed his share of the contract with reference to giving his best efforts in the prosecution of the defendant's claim. We are inclined to think, however, this is a fair question for the jury to pass upon. The litigation in Alaska was adverse to Mrs. Elliott's claim, and we know of no precedent for holding as a matter of law that where a party, acting upon the advice of counsel, fails to prosecute an appeal from an adverse decision, he has not used his best endeavor in the matter. As there must be another trial we refrain from making any finding upon this point. However, it was error for the court to exclude evidence of subsequent litigation by the defendant on the so-called grub stake contract. Such evidence would be pertinent as touching the question of plaintiff's good faith in abandoning any further prosecution of the claim.

Objection is also made to the instructions given by the court, which in our opinion is well taken. The instructions narrow the issues of fact virtually to the question of whether plaintiff used his best efforts and whether he expended the money which he claimed. The primary and fundamental question is as to the agreement of the parties on the question of expenses. We think the point well taken that it was erroneous to instruct the jury that "best efforts and endeavors in good faith" mean what a man would do in his own case. We do not think this is necessarily true, and we are referred to no authority so holding. There might be a variety of considerations, such as ill-health, lack of funds or time, or other considerations, which might move a man to the conclusion that it was wiser to abandon his own particular interests in a certain line, but would not excuse abandonment of his obligations to a principal.

We are of the opinion that this is a case in which the jury should be informed as to all the facts and circumstances, including conversations and other matters occurring both before and after the signing of the documents in question. The evidence shows that Elliott's mining properties in Alaska were worth several millions of dollars, and we are much impressed by the argument that the defendant, being without funds to prosecute her claim, would hardly enter into a contract with plaintiff whereby he might become an equal owner with her in property worth millions, but in the event of failure she should be obligated to pay all the expenses. And why should he abandon the chance for such a large prize after one adverse decis-

ion in the trial court, if further prosecution was to be at the expense of Mrs. Elliott and without cost to him?

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

INDIA RUBBER TIRE COMPANY,
Appellant,

vs.

THOMAS F. FOY, ROBERT L. STEPHENS,
and JOHN E. TRAEGER, as Sheriff,
Appellees.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

2 91A. 231

MR. JUSTICE McSHERRY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree dissolving a temporary injunction, and defendants have suggested that the appeal should be dismissed because the order appealed from was interlocutory and not final. The only relief sought by the bill was to enjoin proceedings under an execution, and the order dissolving the temporary injunction was for want of equity appearing on the face of the bill. This disposition of the injunction disposed of the entire cause, and an appeal therefore lies. Titus v. Mabree, 25 Ill. 232; Prout v. Lemer, 79 Ill. 332; Goddard v. C. & N. W. Ry. Co., 202 Ill. 362.

Is there equity in the bill? It recites that Thomas F. Foy, one of the defendants, was injured by an automobile belonging to the complainant; that he brought suit and recovered a verdict against the Tire Company for \$1,500, on which judgment was duly entered on October 14, 1916, from which the Tire Company prayed an appeal to the Appellate Court for the First District; that the appeal bond and bill of exceptions were duly filed in the Superior Court, but afterwards, and before any record on appeal had been filed in the Appellate Court, said cause being appealable to the March term of the Appellate Court for 1917, the complainant on January 31, 1917, settled with Foy for his injuries and for his judgment by

paying him \$500, and took from him receipts and satisfaction pieces; that thereafter the attorney for the Tire Company notified Robert L. Stephens, one of the defendants, who was the attorney for the plaintiff in the suit in the Superior court, that said cause had been settled with Foy; that thereafter a tender was made to Stephens of the sum of \$200, which was 40% of the amount paid in settlement to Foy, but that Stephens refused to accept the same and demanded a larger sum based upon a notice of attorney's lien which Stephens had served upon the Tire Company prior to the settlement; that thereafter Stephens, although knowing that a settlement had been made with Foy, filed a short record in the Appellate Court and notified the Tire Company, the complainant herein, that he would ask the Appellate Court for a dismissal of its appeal and for an assessment of damages against the complainant under the statute for failure to perfect its appeal in the Appellate Court; and that thereafter the Appellate Court, pursuant to the statute, acted upon said motion and dismissed the appeal and entered judgment against the complainant under the statute for \$150 damages and \$16.75 costs; that on March 28, 1917, execution was issued on said judgment which was duly served upon the complainant, and though complainant presented the facts of settlement by affidavit to the Appellate Court, the Appellate Court held that the statute of dismissal was mandatory and that the court had no authority to do other than that which the statute provided; and that therefore complainant has no adequate remedy at law; that Foy is insolvent, and that irreparable injury will be done to the complainant if the execution should be levied and complainant's property sold thereunder.

We are of the opinion that the chancellor was

right in dissolving the injunction, for the reason that complainant has not shown itself equitably to be entitled thereto. We read the opinion of the Supreme Court in Chicago Federation of Musicians v. American Musicians' Union, 234 Ill. 504, to hold that no circumstances whatever will excuse an appellant from neglecting its appeal taken to a court of review, or will deprive an appellee, upon filing a short record pursuant to the statute, of his right not only to have the appeal dismissed, but also to the assessment of damages provided for by the statute. Complainant in the instant case could have had the judgment in the Superior Court satisfied of record and the appeal to this court dismissed, and no sufficient reason appears to explain why this was not done. While the situation seems to have arisen because of controversy between opposing counsel over the amount of solicitor's fees, yet Poy's attorney was strictly within his statutory rights in his motion in this court, and no good ground exists either in law or equity for depriving him of what he may have gained thereby.

Quite pertinent to the present situation is the following from Telford v. Brinkerhoff, 163 Ill. 439 (443):

"A bill in equity to stay proceedings at law after judgment is always examined with jealous scrutiny. The general rule is, that no relief will be granted where the matter, upon which the claim to relief is founded, was litigated in the original action. * * * Where courts of law and equity have concurrent jurisdiction over a question, and such question is decided at law, equity will not re-examine it."

The order of the chancellor dissolving the temporary injunction was right and is affirmed.

AFFIRMED.

W. B. LOUER, trading as
W. B. Louer Company,
Appellee,

vs.

THOMAS M. WHITE and THOMAS L.
RUSSELL, copartners, trading
as Thomas M. White Company,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 323

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff, having sold and delivered to the defendants an Excavator, brought suit for the balance of the purchase price, and upon trial had judgment for \$896.50 from which defendants appeal.

The Excavator was sold under a written contract dated April 10, 1915, at a price of \$1,250. The contract provided among other things that it was "to work in clay excavating satisfactory to the T. M. White Co."; it also provided that terms of payment were "\$500.00 when machine is accepted; balance in 30 days."

Defendants sought to show upon the trial and contend in this court that the evidence shows that the machine did not excavate in clay in a manner "satisfactory to the T. M. White Co.," and further, that this condition of the contract having failed there was no sale and no obligation upon the defendants to pay the balance of the contract price.

The evidence shows that the machine was delivered about the first of May, 1915, to the defendants, who used it on a job for several days, then moved it to another job where it was used five or six days more, then to another job where it was used four or five days, then to still

another job where it was used seven or eight days. On May 11th, about ten days after defendants had received the machine, during which time it had been at work, the defendants paid to the plaintiff the sum of \$500, which under the terms of the contract was evidence of the acceptance of the excavator. Thereafter the machine was in almost constant use doing excavating work during the months of May, June, July, August, September and October, and there is no evidence in the record showing any claim by defendants that it was unsatisfactory. There was also evidence showing that at an inquest upon the death of a man who was killed while working on the machine, Mr. Russell, one of the defendants, testified that the machine belonged to the T. A. White Company and that it worked in a satisfactory manner and was in good condition. The man was killed in June, so that this testimony at the inquest must have been given at a time subsequent to the date of payment of the \$500. Mr. White, the other defendant, testified at this time that the machine in question was covered by liability insurance and that he was reimbursed for the death of the man under the insurance policy, upon the theory that the machine belonged to the defendants.

We are of the opinion that under a fair interpretation of the contract the payment by defendants of \$500 after they had tried the machine must be held to have been an acceptance of it, that is, that they were satisfied with the character of its work. It is the rule that where a machine is furnished to work to the satisfaction of the purchaser, and such work is a matter of common experience such as ordinary mechanical work, what in reason ought to satisfy the contracting party in law will be held to satisfy him.

Union League Club v. Blymyer Ice Machine Co., 264 Ill. 117;
Eriksen v. Ward, 256 Ill. 259; Kessler v. Clifford, 165 Ill.
 544. It is a further rule of law that where a machine is to
 be satisfactory to the purchaser, notice of dissatisfaction
 or of failure of the machine must be given to the seller at
 the earliest practicable moment. Lehorn v. Stanley, 35 Ill.
 102; Underwood v. Self, 151 Ill. 425; Orion v. Artesian Co.,
 183 Ill. App. 370.

Applying the above rules to the facts appearing
 upon the trial clearly shows an acceptance both as a matter
 of fact and under the law. This being true, defendants are
 obligated for the balance of the purchase price, and the
 judgment therefor was correct and is affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF ILLINOIS,
ex rel. JOEL E. BRUMAGER,
Plaintiff in Error,

vs.

JOSEPH JOHNSON and DAISY JOHNSON,
his wife,
Defendants in Error.

ERROR TO SUPERIOR COURT,
COCK COUNTY.

2091A.324

MR. JUSTICE McSURELY DELIVERED THIS OPINION OF THE COURT.

By this writ of error plaintiff in error seeks to have reversed a decree of the Superior Court in a proceeding of habeas corpus for the custody of Jane Brumager, a child six years old, daughter of the relator, Joel E. Brumager. By the decree the custody of the child was awarded to the respondents.

The matter was heard by the court upon a petition, amended answer and evidence. The petition prayed that the care and custody of the child be given to H. A. Caraway and his wife, who were uncle and aunt of the child, Mrs. Caraway being a sister of the child's father, and ample evidence was presented as to the fitness of the uncle and aunt to have the care and custody of the child. The answer of the respondents alleged that they had had no children born to them and that the child had become deeply devoted to them and that they were desirous of retaining its custody.

The court found that the petitioner, the father, had been divorced from Jane's mother and was awarded the custody of the child; that he had been convicted of a crime and was serving a sentence in the state penitentiary of Montana; that H. A. Caraway and his wife, the uncle and

aunt, reside at Billings, Montana, and that they are fit and proper persons to be intrusted with the child. The court also found that the respondents were suitable persons to have the care of Jane, and held that it was for the best interests of the child that she should be permanently awarded to and remain with the respondents. It was ordered that the petition be dismissed and the writ quashed.

In cases of this sort it is the rule that the principal consideration moving the court is the welfare of the child, and where opposing claimants are equally fit and responsible courts will favor the claims of those who stand in relationship to the child. There is evidence to warrant the inference that respondents were moved in opposing in court the claims of the uncle and aunt by the thought that the removal of the child from their custody would in some way be a reflection upon them. This was entirely unwarranted. A determination as to the custody of the child does not necessarily involve a decision upon the comparative merits of the respective claimants. We are of the opinion that the ties of relationship should control in this matter, and in so doing are reflecting in not the slightest degree against the qualifications of the respondents, who are shown by the evidence to be highly respectable and wholly proper and fit persons.

There is evidence which leads to a fair inference that the respondents were perhaps not so anxious latterly to contest the claims of the uncle and aunt. This also might be inferred from the fact that although counsel have entered their appearance in this court, no brief or argument has been filed in opposition to the claims of Mr. and Mrs. Caraway.

We are of the opinion, in view of all the cir-

cumstances, that the court was in error in the award made, and that the decree should have given the care and custody of the child to the uncle and aunt, H. A. Caraway and his wife, Ida Caraway, the persons named in the petition. The decree is reversed and the cause remanded with directions to award the writ as prayed for in relator's petition.

REVERSED AND REMANDED
WITH DIRECTIONS.

BERTHA M. DOYLE,
Defendant in Error,
vs.
SAMUEL FALLOWS et al.,
Plaintiffs in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

209 I.A. 325

MR. JUSTICE MCGUIRE DELIVERED THE OPINION OF THE COURT.

In Doyle v. Fallows, No. 22628, opinion filed June 11, 1917, this court had occasion to give consideration to one phase of the record of this controversy. In that opinion are recited the matters appearing of record herein, which it is unnecessary to repeat. We there held that the trial court had no jurisdiction to vacate the judgment after the expiration of the 30 day period after judgment. By the present writ of error the defendants attack the validity of the judgment itself.

Defendants say that plaintiff's statement of claim averred that "she was hired by the Illinois Commission of Lincoln Jubilee and Half-Century Anniversary Exposition as stenographer and secretary to the finance committee of said commission," and that she advanced and expended certain money "in the business of said commission"; that nowhere in her statement of claim is any averment of employment by or services rendered to the defendants, and that their names do not appear therein; that in the absence of any statement of any liability on their part or any cause of action against them, the judgment against them cannot stand.

There is merit in this contention. This is a case of the first class in the Municipal Court; it has been repeatedly held that the statement of claim must disclose

a cause of action against the defendant before plaintiff is entitled to judgment. It was so held in Gillman v. Chicago Railways Co., 268 Ill. 305, where the court said: "The finding of the court is that the defendant is guilty as charged in plaintiff's statement of claim, but the statement charges it with no wrong and the court finds none." Applying this language to the instant case it could properly be said that by its judgment the court finds that plaintiff was employed by the defendants and that she rendered services for them, whereas no such charge is made in her statement.

The holding in the Gillman case has been followed in subsequent cases and is now the settled rule. In Walter Cabinet Co. v. Russell, 250 Ill. 416 (420), the court said:

"It is still the law in the municipal court, as in other courts, that a party is limited, in his evidence, to the claim he has made; that he cannot make one claim in his statement and recover upon proof of another without amendment. The issue is made by the statement of claim, and the evidence must be limited by that statement."

Under this rule plaintiff could not properly introduce evidence tending to show employment by the defendants as individuals.

We do not see how the plaintiff is helped by the statement that in the preceipe for summons the names of all the defendants are set out and that they are designated as constituting the Illinois Commission of Lincoln Jubilee and Half-Century Anniversary Exposition. We are aware of no rule by which the omission to state a cause of action in a statement of claim can be cured by reference to other papers in the record.

A further consideration touching the judgment is this - that even if the statement of claim, construed

with the praecipe and summons, should be considered as a claim against the defendants individually, it is the claim of a joint liability on their part. There are ten defendants named in the praecipe, and judgment has been entered against only four of them. It has been held that where joint liability is charged the judgment must run against all or none. C. & C. T. & S. Bank v. Green & Kennedy, 188 Ill. App. 467, and cases therein cited. In Shoudy v. School Directors, 32 Ill. 290, it was held to be the proper practice to strike from the pleadings individual names of the directors as surplusage, and we see no reason why that rule should not obtain in the present case.

In any event we are of the opinion that the judgment against the defendants entered in this case was improperly entered, and it is reversed and the cause remanded for further proceedings as counsel may see fit.

REVERSED AND REMANDED.

215 - 23559

MARY CONNOLLY,
Appellant,

vs.

AMANDA BACHMAN,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 307

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff seeks to have reversed a judgment of nisi capiat suffered by her in a suit in which she sought to recover from the defendant the sum of \$750. The case was tried by the court, and the facts for the most part are stipulated.

On February 1, 1912, William J. Bennett and his wife, owning improved property on Ogden avenue in Chicago, on that day executed a lease of the premises to Edward H. Mulcahy and John J. Cotter. The lease called for rental of \$125 a month, and expired April 30, 1917, the rent to be paid at the office of Benjamin J. Glaser. The following provision was attached to the lease:

"For the faithful performance of the covenants and conditions of this lease the said Edward H. Mulcahy and John J. Cotter have deposited with the Glaser Savings Bank the sum of \$750.00, which shall be held in escrow by said Glaser Savings Bank for William J. Bennett and May Bennett, his wife, or their assigns, and is to be paid to the said William J. Bennett and May Bennett, his wife, or their assigns, at any time said Edward H. Mulcahy and John J. Cotter forfeit said lease by breaking any of the conditions and covenants of this lease, if said Edward J. Mulcahy and John J. Cotter fulfill all the covenants and conditions of this lease then the \$750.00 shall be paid to William J. Bennett and May Bennett, his wife, or their assigns on November 1, 1916, and said \$750 shall be applied to the credit of Edward H. Mulcahy and John J. Cotter for the last six months' rent mentioned in this lease and said William J. Bennett and May Bennett, his wife, or their assigns shall give said Edward H. Mulcahy and John J. Cotter a receipt for six months' rent from November 1, 1916, to April 30, 1917, and said Glaser Savings Bank

while holding this \$750.00 shall pay said Edward H. Mulcahy and John J. Cotter interest at the rate of 3% per annum to be paid every six months for the time said money is left on deposit with said Glaser Savings Bank."

Thereafter, on March 11, 1912, Bennett and his wife sold and conveyed the property to the defendant, Amanda Bachman, and thereafter the original lessees, Mulcahy and Cotter, assigned their interest under the lease to the plaintiff, Mary Connolly. Afterwards, on October 16, 1914, Mary Connolly, with the consent of Amanda Bachman, sublet the premises to Michael Waldron at a monthly rental of \$125. All the monthly installments of rent were paid and the covenants and conditions of the lease observed by the respective lessees. The defendant, Amanda Bachman, collected the rents from Waldron for the last months of the lease, up to April 30, 1917, and it is stipulated that this amount may be considered as \$750 and that any judgment entered herein shall be for that amount. It further appears that the Benjamin J. Glaser mentioned in the lease at the time it was executed was doing business in Chicago under the name of the Glaser Savings Bank, and that it was executed in Glaser's office and the \$750 mentioned in the provision above quoted was delivered to both Bennett and Glaser and counted by them, and Glaser then took possession of it. The lease was prepared by Glaser at the request of Bennett, and it is in evidence that Glaser represented Bennett in this transaction. It also appears that some time afterwards Glaser turned over his private bank to the Ogden Avenue State Bank, including the \$750 item above referred to, and that neither of the parties to this suit has since that time been able to obtain this money from the Ogden Avenue State Bank.

From a consideration of these circumstances it is clear that the \$750 was not given to Glaser to be held in escrow, but was given to him as agent for the Bennetts against any damages which they might suffer through breach by the lessees of the covenants of the lease or, should no breach occur, in payment of the last six months' rent of the term of the lease. Money or papers held in escrow should be held by a stranger to the transaction, delivery not to be made until certain conditions have transpired. In the instant transaction not only was the money delivered to Glaser, the agent of the lessors, but they were unconditionally to retain it, either as damages or rent; in no event was it to be returned to the lessees. This was not a delivery in escrow but was payment to the lessors.

"A delivery to the agent of the grantee or to the party who is to have the benefit of the instrument has the same effect as a delivery directly to the grantee, and cannot create an escrow." 6 Am. & Eng. Ency. of Law, 1st Ed., p. 861; see also Clark v. Harper, 215 Ill. 24, 40; Fitzgerald v. Allen, 240 Ill. 80, 94. "In order to be an escrow it must be delivered to a stranger. Nothing but an absolute delivery can be made directly to the grantee." Ryan v. Cook, 68 Ill. App. 592, affirmed 172 Ill. 302. In DeGraff v. Manz, 251 Ill. 531 (537), the court said: "When the deeds were delivered to the escrow holder and the grantor parted with all control over them the delivery was complete, and thereafter the escrow holder held the deeds as the agent and representative of those for whose benefit the subsequent acts were to be performed." See also Schmidt v. Deegan, 69 Wis. 305; Hughes v. Thistlewood, 40 Kas. 332.

The defendant, Amanda Bachman, having succeeded to the rights of William J. Bennett and wife, and the plaintiff, Mary Connolly, having succeeded to the rights of Mulcahy and Cotter, the original lessees, it must be held under the terms of the proviso of the lease that the rent due from plaintiff to the defendant for the last six months of the term has been paid by the \$750 deposit referred to, and that the defendant must look to Glaser for this money; and as the defendant has collected the rental from plaintiff's subtenant, Waldron, for this same period, it follows that plaintiff is entitled to recover this from the defendant. The judgment of the trial court therefore is reversed and judgment for plaintiff against the defendant is entered in this court for \$750.

REVERSED AND JUDGMENT HERE.

MICHAEL REILLY and JOHN REILLY,
by Kate Hoy, their Guardian and
Next Friend,

Appellees,

vs.

CATHOLIC ORDER OF FORESTERS,
Appellant.

APPEAL FROM COUNTY COURT,
COOK COUNTY.

209 14 329

MR. JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiffs, the children of Michael F. Reilly, to whom the defendant had issued a benefit certificate for the sum of \$1,000, upon his death and refusal of the defendant to pay, brought suit and upon trial before court and jury had verdict and judgment for \$1,000 from which defendant appeals.

Two defenses are presented. The first is false replies by Reilly to questions in the medical examiner's blank; that the correctness of such replies was warranted, hence under the terms of the policy it is voided. These particular questions concerned any treatment from a physician within three years, and whether Reilly had been an inmate of "any asylum, sanitarium, hospital or institution of any kind for the purpose of being treated for any mental, nervous or physical disorder, ailment or defect." To these questions the answer was negative. The date of this instrument was April 11, 1915, and the proof was that on March 5, 1915, Reilly had been admitted to the Cook County Hospital, where he had been treated for arthritis of the wrist.

Reilly at this time was about 40 years of age, apparently in good health, employed as a street sweeper in the city of Chicago; he was uneducated, being unable to

read or write the English language; when his signature was required he had to sign by making a mark. All the answers to the questions contained in the application and medical examiner's blank were written by the doctor who examined him. These documents contained many questions; they are said to be 108 in number, some of them very complicated and technical; 54 diseases or ailments are mentioned concerning which the applicant was required to give answers. The number and character of these questions and the character of the applicant make it self-evident that his replies thereto could not be warranties. It would be almost beyond the powers of even a highly intelligent man to answer all of these questions with accuracy.

These circumstances readily place this case among the many holding that answers to such interrogatories are not warranties but representations, in face of any statements to the contrary in the application. Some of these cases are, Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Mouler v. American Life Ins. Co., 111 U. S. 335; Weisguth v. Sup. Tribe of Ben Hur, 272 Ill. 541; Minnesota Mut. Life Ins. Co. v. Link, 230 Ill. 273; Peterson v. Life Ins. Co., 244 Ill. 329; Nash v. Eddy, 184 Ill. App. 375. It is also the rule that the untruth of such statements constitutes no defense to an action on the policy unless they concern matters material to the risk and are made with the intent to defraud the insurer. Globe Life Ins. Assn. v. Wagner, 188 Ill. 133; Raymer v. Modern Brotherhood, 157 Ill. App. 510; Atkinson v. National Council R. & L. of S., 193 Ill. App. 215; Groffinger v. Metropolitan Life Ins. Co., 183 Ill. App. 618.

It was for the jury to determine whether or not the misstatement made by Reilly was material to the risk or made with the intent to defraud the defendant. Manufacturers, etc., Ins. Co. v. Zeitinger, 168 Ill. 286; Kehl v. Abram, 210 Ill. 218. The evidence shows that Reilly died suddenly on November 8th, and after inquest the coroner found that he had died from organic heart disease. The defendant's physician who examined him, after an apparently most thorough examination, had found no trace of any disease whatever, and there seems to have been nothing obvious to apprise anyone of the disease from which he died. The stiff wrist for which he received treatment at the Cook County Hospital was evidently induced by penetration of a needle, part of which remained in the wrist. From these facts the jury was fully justified in finding that there was no connection between this injury and the disease which caused his death, and his answers were without fraudulent intent. It follows from these considerations that the defense of false statements in the application cannot prevail.

The second defense asserted is forfeiture for failure to pay monthly assessments. By the by-laws Reilly was required to pay a monthly assessment of \$1.76 on the first day of each and every month without notice, and on failure to do so before the first day of the succeeding month he stood suspended from the society. The evidence shows that his October dues were not paid on or before November 1st. It was also shown that the August dues were not paid until September 27th, and that on that date the financial secretary accepted the dues for both months from Reilly, with knowledge that the August dues had not previously been paid. The record also shows that a few days

before Reilly died he gave the money both for the October and November assessments to his sister, a Mrs. Flynn, with instructions to pay them; that Mrs. Flynn gave it to her husband, James Flynn, who went to the lodge meeting the night of November 8th, when this money was paid to the secretary and received by him, and that at that time neither the secretary nor Flynn knew that Reilly had died that afternoon.

We hold that these circumstances call for the application of the rule that an insurer will not be permitted to assert a forfeiture of its policy for nonpayment of premiums when due, where its dealings with the insured have led him to believe that the provision for forfeiture would not be relied upon. It is the established law of this state that forfeitures or suspensions for failure to pay assessments and dues promptly may be waived, and we shall apply this rule to this case. In so doing we are in accord with what is said in Jones v. Knights of Honor, 236 Ill. 113; Nebergall v. Prudential Ins. Co. of America, 193 Ill. App. 189; Cox v. American Ins. Co., 184 Ill. App. 419.

Under the larger body of decisions in this state defendant's defenses are of no avail, and the judgment therefore is affirmed.

AFFIRMED.

THOMSON AND TAYLOR SPICE
COMPANY, a corporation,
Appellee,

vs.

APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

THE I. LANSKI AND SON SCRAP
IRON COMPANY, a corporation,
et al., (Defendants),

On Appeal of THE I. LANSKI
AND SON SCRAP IRON COMPANY.

209 I.A. 631

MR. JUSTICE McSweeney DELIVERED THE OPINION OF THE COURT.

This is an appeal by Lanski and Son from an interlocutory injunction obtained at the instance of the complainant, which by its bill seeks to have Lumber street in Chicago, adjoining its place of business, kept free from obstructions placed thereon by Lanski and Son and other defendants. The preliminary injunction was granted upon filing of the bill, with notice to Lanski and Son only.

Both counsel have presented for consideration many points which properly are material upon a consideration of the merits on final hearing and upon which we shall not comment at the present time. We shall consider only the propriety of the preliminary injunction.

The prayer of the bill is:

"that said The I. Lanski & Son Scrap Iron Co., a corporation of the State of Illinois, its agents, lessees, employees and servants, said Walter Sheriffs and said Joseph F. Schmidt, may be forthwith restrained and enjoined from obstructing or continuing to obstruct said public highway, known as Lumber street, between 20th place and W. 22nd street, throughout its entire width of sixty-six (66) feet, with scrap iron, junk, buildings, fences or other structures, freight cars, wagons or other vehicles, tools, machinery or other implements, or in any other manner or form either temporarily or permanently to interfere with the free and unrestricted use of said Lumber street between 20th place and W. 22nd street for its entire width of sixty-six (66) feet both by the general public and your orator and its agents, employees, servants and customers,

and from directing or permitting any private work or operations of any kind to be carried on for them or any of them in or upon said Lumber street between 20th place and W. 22nd street as aforesaid, or to do or suffer to be done any act or thing that will in any way interfere with the full and free use and enjoyment of said public highway by your orator, its agents, employees, servants or customers, as well as by the general public."

The preliminary injunction is as follows:

"It is, Therefore, Ordered, That said defendant, The I. Lanski & Son Scrap Iron Company, a corporation, of the State of Illinois, its lessees, agents, employees and servants be, and they hereby are, restrained and enjoined, until the further order of this court, from further obstructing the public highway known as Lumber street between 20th place and W. 22nd street in the City of Chicago, County of Cook, and State of Illinois, throughout its entire width of sixty-six (66) feet, with scrap iron, junk, buildings, fences or other structures, freight cars, wagons or other vehicles, tools, machinery or other implements, or in any other manner or form either temporarily or permanently to interfere with the free and unrestricted use of said Lumber street between 20th place and W. 22nd street in said City of Chicago, for its entire width of sixty-six (66) feet both by the general public and by said complainant, Thomson & Taylor Spice Company, a corporation of the State of Illinois, and its agents, employees, servants and customers, and from directing or permitting any private work or operations of any kind to be carried on for them, or any of them, in or upon said Lumber street between 20th place and W. 22nd street as aforesaid, or to do or suffer to be done any act or thing that will in any way interfere with the full and free use and enjoyment of said public highway by said complainant, Thomson & Taylor Spice Company, its agents, employees, servants or customers, as well as by the general public."

It thus appears that the complainant has obtained by the preliminary injunction substantially all the mandatory relief it seeks by its bill. We are not persuaded that the order merely restrains the defendant from occupying more space in the street than it is now occupying. The injunctive order restrains defendant from "further obstructing * * Lumber street * * throughout its entire width of sixty-six (66) feet," which can only mean that this entire space must be kept clear. Considering the absence of any allegation in the bill of an intent by the defendant to occupy more space than that occupied, and also the scope of

the injunctonal order, there is little doubt that under the order defendant must forthwith remove all obstructions, buildings and the other things named, from the entire width of 66 feet in Lumber street.

It has been held many times that the sole object of an interlocutory injunction is to preserve the subject in controversy in the condition it then is; it cannot be used for the purpose of compelling one to undo what he has already done. The purpose of a preliminary injunction is to preserve the status of the parties until the court can determine the merits of the controversy. I. S. & M. S. Ry. Co. v. Taylor, 134 Ill. 603; Fisher v. Board of Trade, 80 Ill. 85; Baxter v. Board of Trade, 83 Ill. 146; World's Columbian Exposition v. Brennan, 51 Ill. App. 128; Lowenthal v. New Music Hall Co., 100 Ill. App. 274.

It may be that upon final hearing it will be determined that complainant is entitled to the permanent injunction sought, but upon this we express no opinion. We do hold, however, that under the reasoning of the cases above cited the preliminary injunctonal order was improvidently granted, and it will be reversed and the injunction dissolved.

ORDER REVERSED AND INJUNCTION DISSOLVED.

212 - 23178

G. L. CLAUSEN,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

vs.

LOUIS FINKELSTEIN et al
On appeal of
GARDEN CITY WRECKING and
LUMBER COMPANY,

Appellant.)

209 I.A. 341

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal by the Garden City Wrecking and Lumber Company, appellant, from a judgment in the sum of \$500.00 obtained by G. L. Clausen, appellee, for personal injuries sustained in falling upon a pile of junk located somewhere near the middle of the premises now occupied by the Insurance Exchange Building.

In the early part of January 1911, the appellant company was engaged in wrecking some old buildings located on the block bounded by Jackson boulevard on the north, Fifth avenue on the west, Quincy street on the south and Sherman street on the east. One Finkelstein, originally a party-defendant to this suit, but dismissed out at the close of the plaintiff's case, being engaged in the scrap-iron and metal business, sometime prior to the date of the accident, purchased from the appellant, certain portions of the scrap-iron and metal which would come out of the buildings in the course of their demolition. A day or two prior to the accident, one Wermes, a party-defendant to this suit, was employed by Finkelstein to haul some

AMERICAN
COUNCIL

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of the scrap-iron away from the premises and take it to Finkelstein's place of business at 47th and Locnis streets. Wermes used his own teams and wagons and hauled the iron for \$3.00 a load, to be paid by Finkelstein, and received no compensation of any sort for that work from anybody else. The appellant had nothing whatever to do with the delivering of the iron. As it was taken out of the building, it was put in a pile, somewhere near the middle of the block, about seventy-five feet from where the wrecking operations were being conducted. On January 6, 1911, between 12:20 and 12:30 P.M., appellee, Clausen, who was in the employ of the Thompson-Starrett Construction Company, who were the general contractors for the erection of the Insurance Exchange Building, a civil engineer, who had been engaged by that company in the taking of levels, in walking east near the middle of the block in question, came to a pile of iron rods, or pipes, or both, about eight inches high, altogether, and sixteen feet long, on which Wermes was working. The latter had about completed loading his wagon. Appellee claimed that Wermes, at the time, had hold of one end of a long slender iron rod which was about sixteen feet long and from a half to three-quarters of an inch thick, which he was moving or switching up and down, and that he waited a minute or two and then put his foot on the rod that was in motion and undertook to pass over; that as soon as he put his weight on the rod, in order to step over, a violent side-movement took place under his foot, threw him out of balance and he fell on his left hand, which was, as a result, seriously and permanently injured. The teamster, Wermes, who did the hauling, claimed, however, that, at the time of the accident, his wagon was completely loaded with

the exception of one piece, and that that was a four-inch pipe, sixteen feet long, weighing about 185 to 200 pounds. His evidence is to the effect that he had a stake in the hind wheel, on which he put the iron pipe in order that he might get it balanced so that he could take one end of it and throw it over on the wagon; that he was in the act of putting it on when appellee walked ahead of his team and stepped on the iron, fell down and got up and walked away. As we view the evidence, a close consideration of the minor differences in the statements of appellee and Wermes as to just what took place at the time of the accident, becomes unimportant.

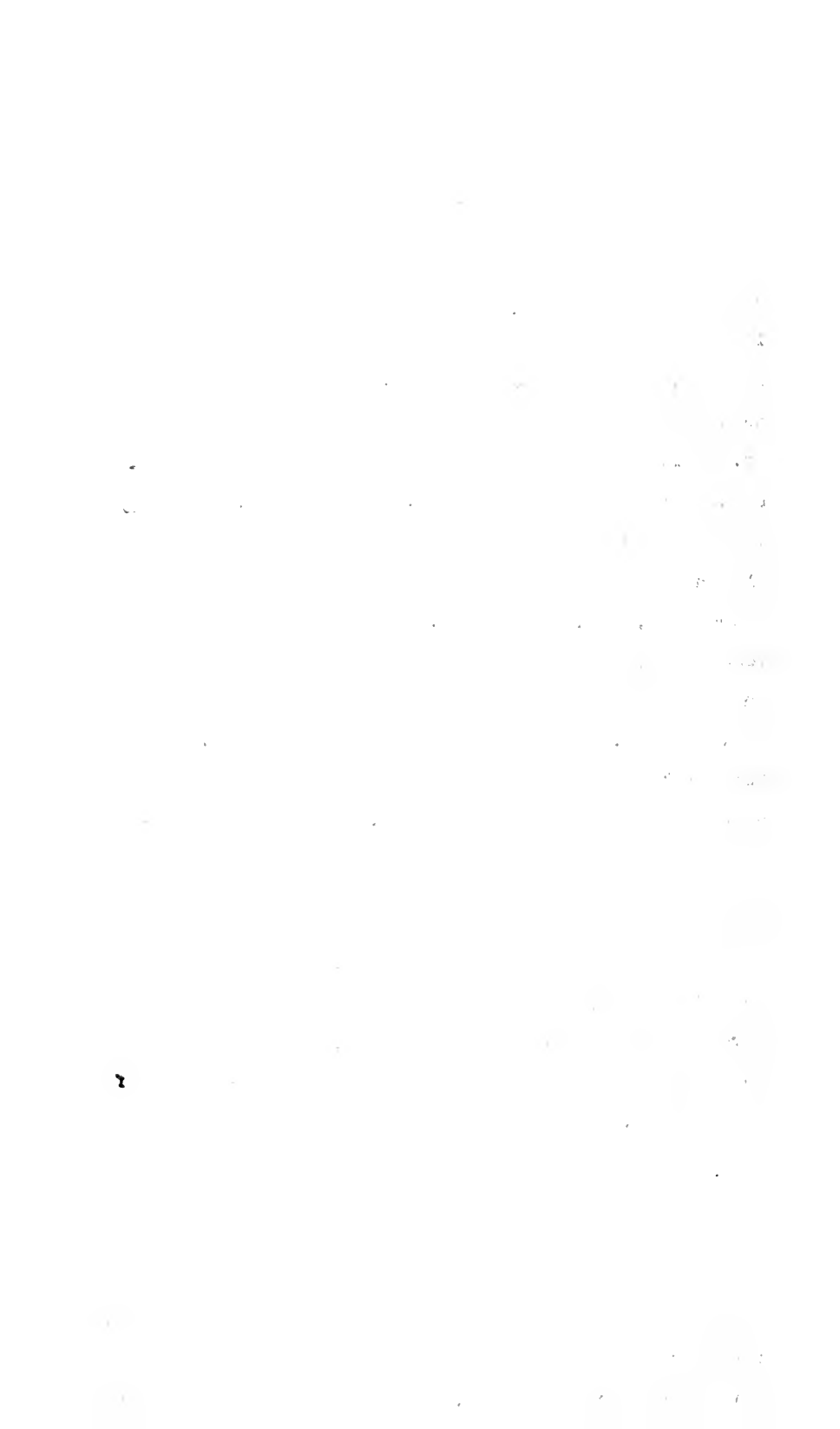
It is claimed by the appellant that there was no relation between Wermes, the man who hauled the scrap, and the appellant, Garden City Wrecking and Lumber Company, whereby the latter can be held to respond in damages to the appellee, on account of any negligence on the part of Wermes. A determination of that contention involves a consideration of the facts only in so far as they pertain to the status of Wermes at the time of the accident; his relations with Finkelstein and, if any, with the appellant, Garden City Wrecking and Lumber Company.

The evidence of Finkelstein is that he bought the iron of appellant when it was in the building, before it was wrecked; that the iron was to be piled up for him; that he hired Wermes to haul the iron at \$3 a load. The testimony of Finkelstein as to just what the terms of his oral contract with appellant were, is somewhat confusing, but, upon a careful examination, it is to the general effect that when he bought the iron there was no actual agreement, and



it was not to be implied that appellant should do any of the loading of the wagons; although when first asked if there was any provision "as to who should load the wagons", he answered, "Yes sir". "Generally it is the custom that the Garden City Company loads the wagons for me." "It was said when I bought the iron that the iron should be loaded on my wagons." Afterwards, ^{in answer} however, to the question, "Was there anything said by Mr. Waixel as to placing the iron on the wagons?", he answered, "No, not that I know of", and, further, Q. "Was there anything said about loading it, as to who was to load it?" A. "It is always understood that I send the teams and it has got to be loaded on the wagon. I don't have to be there at all." Q. "No, but was there anything said as to who should superintend or direct the loading of it?" A. "No, No, because -"

The evidence of Waixel, president of the appellant, is to the effect that he (for appellant) sold the iron, which was taken out of the building, which was being wrecked, to Finkelstein; that he had no control or management over Werners on the 6th or 7th of January, 1911; that it was not the duty of appellant to load the iron on the wagons for Finkelstein, although it was customary to assist when you could in the loading of all iron that was heavy; that although he was on the premises on January 6 and 7, 1911, he was not there at the time appellee was injured; that he did not direct where the wagons hauling that material should be loaded or the manner in which they should be loaded; that they (meaning the appellant's employees) had nothing to do with Finkelstein's wagons; that the place where the wagon would be loaded would not be under the direction of appell-



ant's foreman because the iron was all set in one place and the teams that hauled the iron went to that place to load; that when he made the oral contract with Finkelstein there was nothing said in the conversation with reference to the place of delivery of the iron; that there was nothing said between them with reference to loading the iron on the wagons to be furnished by Finkelstein; that he had no conversation with Wermes about hauling the iron away from the job and paid him nothing, either for hauling or loading the wagons. Although he, at one time, stated that he had a foreman directing where and in what manner the wagons should be loaded, his evidence all taken together is to the definite effect that appellant had nothing to do with the loading, save as a "hand" might occasionally be given in case of a heavy piece.

The evidence of Wermes, the teamster, is to the effect that he was employed by Finkelstein and that Finkelstein paid him \$12 for four loads which he hauled on that day; that at the time he talked with Finkelstein there was nothing said between them about loading the iron; that the appellant paid him nothing in connection with the hauling of that iron; that the foreman of appellant was never around his wagon at any time when it was being loaded; that at no time while working on that job did he receive any orders or directions either from Waixel, president of appellant company, or from his foreman; that on the day in question there was a pile of iron which made up four loads; that there was a lot of pieces there that he could not lift and he called someone to help him; that there were men standing around there; that he said, "Come on, give me a hand", and they would go over and give him a lift; that they were working for appellant; that they did it as a matter of

accommodation to him, to help him out; that that happened as to a couple of pieces in the course of three or four loads; that he took it upon himself to ask those men to help him load the iron. The testimony of Wermes is, at times, somewhat conflicting, but is to the effect, substantially, that he only got help when he asked for it - and then only as to a few pieces - and that it was then given to him gratuitously.

It is claimed by the appellant that there was no relationship between it and Wermes whereby it could be held to respond in damages to appellee (Clausen) on account of any negligence on the part of Wermes. On the other hand appellee claims that by the contract of sale of the iron to Finkelstein, it was the obligation of appellant to load the iron on the wagon for Finkelstein that therefore appellant had the right to direct and control Wermes, the teamster, in the loading of the iron; that in loading the iron Wermes was rendering a service to the appellant; that, therefore, appellant "was the master and Wermes the servant, and, as to a third person injured, the doctrine of respondent superior applies."

The difficulty with the contention of appellee is that the evidence tends to prove only that there was no obligation on appellant to load Wermes' wagons. Finkelstein's evidence is a substantial denial of such an obligation; Waixel's evidence is practically a categorical denial; and Wermes merely intimates that, when he found a piece too heavy to lift, he called for, and got a "hand" from some of appellant's employees and that that happened as to a couple of pieces in the course of three or four loads. The doctrine of respondent superior is applicable only when the one sought

to be charged has some right in some way to control the conduct of the one charged with having caused the injury.

Harding v. St. Louis Stock Yards Co. 242 Ill. 444. When Wermes was loading his wagon he was performing an act for himself, for his own benefit. He was not rendering a service to appellant. When he had hold of the rod or pipe which tripped appellee, he, Wermes, was working for himself, entirely and completely, uncontrolled by appellant or any one else, save himself. The evidence fails to show the appellant had any right or control over Wermes in the loading of his wagon. The fact that in a few instances, when pieces were heavy, he called some employees of appellant to give him a lift, and they in a spirit of commendable generosity lent a hand, did not make appellant, in the eyes of the law, responsible for the injury suffered by appellee, Although there is a word here and there in regard to appellant having some right as to where and in what manner the wagons should be loaded - what might be called a scintilla - it is impossible, upon a careful consideration of the whole record to avoid the conclusion that the verdict was clearly and manifestly against the weight of the evidence.

The judgment is reversed and judgment in favor of the appellant will be entered here.

REVERSED AND JUDGMENT HERE.

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(2) $\lim_{n \rightarrow \infty} \frac{f(n)}{g(n)} = L$, where L is a real number.

1. *Chlorophyll a* (Chl *a*)

7. (4x) = 4x

226 - 23192

DAVID A. ERIKSON,

Appellee,

vs.

MERCHANTS RESERVE LIFE
INSURANCE COMPANY, a corp.,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 342

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment rendered against appellant (Merchants Reserve Life Insurance Co.) in an action brought by David A. Erikson, appellee, to recover on a \$1,000 policy of life insurance issued by appellant on December 3, 1890, to one Jessie A. Erikson.

On December 3, 1910, appellant issued to Jessie A. Erikson a \$1,000 policy of life insurance wherein appellee (David A. Erikson, her husband) was named beneficiary. It was a quarterly-term contract capable of being renewed every three months upon the payment of \$3.03 on the first days of January, April, July and October of each year. It was provided that if the premium was in default over thirty-one days, the policy became null and void, but within two years thereafter could be reinstated upon furnishing certain evidence of insurability, and the payment of overdue premiums, with interest.

The premium which became due on January 1, 1915, was in default and was not paid within thirty-one days thereafter. On February 3, 1915, appellee (husband of

the insured) mailed a check to appellant for the premium on the policy in question. The next day, February 4, 1915, appellant wrote appellee and Jessie A. Erikson, informing them that the premium had been sent too late and that a certain enclosed health-certificate should be filled out and returned to the Company which would then consider the question of reinstatement. February 8, 1915, appellee filled in the blanks and had Jessie A. Erikson, his wife, sign the following document:

"Health Certificate.

I Jessie A. Erikson, having lapsed my policy in the Merchants Reserve Life Insurance Company of Illinois, and desiring to be reinstated therein, do declare, guarantee and warrant on my honor that I am by occupation a that I am of sound constitution, good health and temperate habits; that since the date of my application for membership and insurance, I have sustained no personal injury nor been afflicted with any disease or sickness whatsoever or have I consulted a doctor, except, to-wit..... from which I have fully recovered, and that I have not made application for insurance to any other company, association or society upon which a policy or certificate has not been issued.

This statement is given as a part of the consideration for reinstatement of my policy.

No. 853

Date Feb. 8, 1915.

Witness.....

Witness.....

Jessie A. Erikson,
If lapsed sign here."

Appellee then sent the health certificate to appellant, which duly reinstated Jessie A. Erikson as a policy holder and sent to her, a receipt dated February 22, 1915, for the January premium. On March 7, 1915, twenty-seven days after the date of the health certificate, Jessie A. Erikson died.

The evidence shows that Jessie A. Erikson, the insured, was, at the time of her death, about thirty

years old; that throughout the latter part of her life she had been a somewhat frail woman; that she was five feet four inches in stature and weighed, at the time of her marriage, in 1909, from 106 to 108 pounds; that in the course of two years immediately preceding her death, she gained over thirty pounds in weight; that after her marriage with the exception of a short period, she did all the housework. On March 12, 13, 14, 15 and 19, 1913, she was attended by a physician for a slight illness which, in his judgment, was due to eating canned tomatoes. From that, which, in the judgment of the physician, was only temporary, she entirely recovered. The same physician, on June 17, 1914, treated her for inter-costal neuralgia on the left side, which was caused by some infection, or by a cold. From that she recovered in two days, without impairment of her general health. He treated her again on August 3, 1914 for some minor trouble.

From the testimony of the physician who attended her at the time of her death, she died of a cerebral hemorrhage, the cause of which is not known. Upon the trial of the case, the jury brought in a verdict finding the issues against the defendant (appellant) and assessing the plaintiffs damages in the sum of \$1090.30. The jury also made two special findings; first, that Jessie A. Eriksen did ~~not~~ professionally consult a physician after the issuance of the policy and before the signing of the certificate of health; second, that, after the issuance of the policy, and before the signing of the certificate of health, she did not suffer from any illness or disease.

It is contended by appellant (1) that the statements made in the health-certificate were warranties and must be literally true; (2) that the insured made false statements in her application for reinstatement, which rendered the policy void.

As the obligation of insurance had ceased by reason of the default in payment of the premium, a health certificate was required as a prerequisite to its re-establishment. It was required because the appellant was interested in ascertaining whether the insured was still a satisfactory risk; that is, in good health, and so, as a matter of precaution, required the insured to furnish a signed certificate of health before being reinstated. In the instant case the back premiums were paid and a health certificate duly signed, and the question now arises as to its meaning, and whether the statements therein are true and whether there were any warranties that were violated. In Crosse v. Knights of Honor, 254 Ill. 180, the court said that warranties are not favored in the law and that if there is anything tending to show that the statements were not intended as warranties, "such answers or statements as are not material to the risk and were honestly made in the belief that they were true will not present any obstacle to recovery. If such a construction may be reasonably given the contract the statements will be considered as mere representations notwithstanding the policy states that they are to be deemed warranties, and if not material will not be available as a defense."

The words "do declare, guarantee and warrant, on my honor" might easily create a warranty if contained

within an appropriate context. Here, however,- owing to a space left blank, save for a line drawn in ink, and in which space it seems to have been the intention to write (1) any injury, disease or sickness the insured may have experienced since the date of the application for insurance, and (2) the name of the Doctor consulted since then,- it would be unreasonable, particularly bearing in mind that warranties are not favored in such cases (Weisguth v. Supreme Tribe Ben Hur, 272 Ill. 541), to hold that the health certificate in question did constitute a warranty. Stanyan v. Security Mut. L. Co., 99 Atl. 417. Further, the closing words of the certificate, "This statement is given as a part of the consideration for reinstatement of my policy", are at least incompatible with the claim that the language of the certificate gives rise to a warranty. Mouler v. Insurance Co., 111 U.S. 335. As to the claim of appellant that even if the statements were representations they were so material to the risk that they vitiated the policy, we are of the opinion that it is untenable. Having reinstated the policy without further inquiry, the appellant must be considered as having wittingly waived the manifest imperfection of the health certificate. Insurance Co. v. Raddin, 120 U. S. 183; Stanyan v. Security Mut. L. Co., supra.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

278 - 23244

MAY H. LUENERS,

Appellee,

vs.

A. H. MARSHALL,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 344

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a judgment entered upon the verdict of a jury, in favor of the appellee (hereinafter referred to as plaintiff) and against the appellant (hereinafter referred to as defendant) for the sum of \$2071.66 upon two promissory notes dated February 11, 1916, each for the sum of \$1,000., due thirty and sixty days, respectively, after date, payable to the order of the plaintiff, bearing interest at six percent per annum.

The evidence shows that the two promissory notes were given by the defendant to the plaintiff, together with \$500 in cash for the purchase of 3500 shares of stock, in the National Pure Food Company. At the time the plaintiff and the defendant entered into the contract of purchase and sale, a writing, in the nature of an escrow agreement was executed, and which is substantially the same as follows:

the first of these is the fact that the
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the twenty-first is the fact that the

"Feb. 11, 1916.

"I, May H. Luehrs, * * * sell, * * * unto Mr. A. H. Marshall, all of my right, title and interest in and to, 3,500 shares of stock * * * for the sum of 2,500.00 upon the following terms and conditions. \$500.00 cash in hand paid * * *, \$1,000.00 in 30 days and \$1,000.00 in 60 days secured by two promissory notes * * *. I hereby agree and do transfer my stock in blank to be placed in the National City Bank of Chicago, to be turned over to the said Marshall, his heirs or assigns as soon as the balance of \$2,000.00 is paid.

May H. Luehrs.

Witness:

Chas. R. Ayars.

P.S. It is further * * * agreed that my depositing my 3,500 shares of stock in escrow and accepting \$500.00 in cash and the two notes as above referred to hereby constitutes the final sale of my stock * * * provided however that in the event that either or both of the notes are not paid upon maturity, Miss Luehrs reserves the right to return the notes and take back the stock; the \$500.00 already paid to remain her property. This escrow expires April 11, 1916.

May H. Luehrs.

Accepted:

A. H. Marshall.

Witness:

Chas. R. Ayars."

The notes and the contract, together with the 3,500 shares of stock, were deposited in escrow with the National City Bank of Chicago and were held by it at the time of the trial. The important question in the cause is whether the plaintiff, about the time of the maturity of the first note agreed with the defendant to take back her stock, surrender the two notes and retain the \$500. The evidence of the defendant is to the effect that about the time the first note came due he told her he could not pay the note; that the plaintiff said, "I want my money or my stock back"; that he then told her that was all right,

that he would lose the \$500., and she should have the stock back again; that he, further, said, "I am ready to go to the bank with you", to which she responded, "It is too late today"; that he then said, "That is your ultimatum?", to which she responded, "It is: I want my stock back unless you pay the note"; that he, further, said, "I cannot pay the note, so I will have to give your stock back to you", to which she answered, "It is pretty late today; we will go some other day"; that he then told her he was leaving the city and would be gone for several days and she said, "That is all right. We will get it when you come back." The foregoing conversation, as narrated by the defendant, is denied in detail by the plaintiff. She testified that the defendant said he was unable to pay the note and gave certain reasons for his inability and promised that as soon as he was able to obtain money from other sources, he would pay both notes.

As to whether or not plaintiff and defendant actually orally agreed to rescind the contract of sale, before the stock and notes were taken out of escrow, was a question of fact, and was determined by the jury adversely to the defendant, and, considering the evidence as presented to us by the record, we are of the opinion that they were sufficiently justified in their conclusion.

Appellant contends that appellee was allowed, over objection, to testify to part of a conversation, which appellant had already undertaken to recite. It is true it pertained to a matter that might be considered prejudicial, but as it was a statement made by appellant purporting to be a reason why he was not able to pay his notes, and was a material part of the conversation, part of which appellant had

already given in his testimony, it was both material and competent. As to the questions on the examination of Higginbottom, which asked for the meaning of an answer he had given when cross-examined by counsel for appellant, they were made necessary in order to understand what the witness meant by the use of the words "condition of the other officers."

Appellant further contends that the trial judge erred in refusing to give instructions referred to as numbers 2, 3, 4, and 5. The substance of these instructions, as far as it was applicable to the evidence, was actually given; and, further, when the trial judge had finished orally charging the jury, counsel for appellant did not except in any way to the instructions given or claim that the oral charge did not give the substance of certain requested instructions (numbers 2, 3, 4, and 5) but took "exception to the refusal of the court to give the instructions I have requested." Briggs v. Joseph & Bros. Co., 175 Ill. App. 433.

Finding no error in the record the judgment is affirmed.

AFFIRMED.

307 - 23273

VIRGINIA DREYFUSS,

vs.

WILLIAM FREUD, ET AL,

Intervening Petitioners,

THOMAS M. HOYNE, ET AL

Appellees,

vs.

LOUIS GROLLMAN, ET AL

Appellants,

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

209 I.A. 345

MR. PRESIDING JUSTICE TAYLOR delivered the opinion of the court.

This is an appeal from a decree which provided that the appellees, Thomas M. Hoyne, John G'Connor and Harry D. Irwin, should have a lien in the sum of \$518.65, upon a certain decree and upon certain real estate. An agreement of facts set forth in the certificate of evidence shows that on October 15, 1912, appellees made a written contract with one Virginia Dreyfuss, by which they were to receive, in consideration of legal services, "a sum of money equal to 25 per cent of the gross amount recovered" for her; that she sold, assigned, transferred and set over to them, "25 per cent of said cause of action and 25 per cent of any verdict or judgment rendered therein, as well as 25 per cent of any sum of money or other property" that might be paid by, or on behalf of, the defendant in said cause, prior or subsequent to any verdict or judgment, or upon any compromise

thereof. The agreed statement of facts further shows that appellees successfully conducted certain litigation so that on September 11, 1913, a decree in the sum of \$2,000, with interest thereon, from February 17, 1912, was entered in her favor, which provided that she was entitled to a lien on certain real estate to secure said amount, and ordering its payment within three days from the date of said decree; that afterwards, upon an appeal by the defendant, to this court, the decree, on November 10, 1914, was duly affirmed.

The agreed statement of facts further shows that on September 16, appellants (Morris A. Weinberg and Louis A. Grollman) were duly notified, in writing, of the claim of appellee under their agreement with their client, Dreyfuss; that the said notice was received in due course of mail by the said appellants on September 16, 1913, at which time they, themselves, were two of the defendants in said suit and were the solicitors for all the other defendants, except a minor whose guardian ad litem was also served with notice; that at the time of the service, September 16, 1913, the minor owned an undivided one-quarter interest in the premises and Louis Grollman an undivided three-quarters interest therein; Grollman having, before the entry of the decree and during the pendency of the suit, purchased the interests of all the defendants in said premises, except that of the minor; that at the time of the service of the notice, the three-quarters interest then owned by Grollman was of the net value of \$2500.

On September 17, 1913, appellants wrote to appellees, "We acknowledge receipt of yours of the 16th inst., advising us of your interest in this litigation. We certainly shall see to it that no adjustment of this

matter is ever made without protecting you on your fees." Subsequently, on April 2, 1914, Louis Grollman purchased the interest of the minor, and, on the same date, without the knowledge of the appellees, made a settlement with appellees' client, Dreyfuss, for the sum of \$1250., and received from her a conveyance of her interest. On the same day, Louis Grollman, one of the appellants, wrote to appellees' client, Dreyfuss: "Relative to the settlement of the decree, * * * I agree to pay to your attorneys * * * fees due to them under your written agreement with them, such fees not to exceed an amount of 25 per cent of the amount of the settlement made with you." Also, on that date, Louis Grollman called upon and tendered to appellees, the sum of \$312.50, being 25 per cent of the amount paid to said Dreyfuss, which tender was refused. It is admitted that the legal service rendered by appellees, to their client, Dreyfuss, in the suit in the Circuit and Appellate Courts, were reasonably worth more than 25 per cent of the amount awarded to her under the decree and that none of the services have yet been paid for. Since the entry of the decree, Louis Grollman has sold and transferred the premises to the defendants, Regina Alcan and Hattie R. Alcan, and they now claim to be the owners of the premises.

It is claimed by appellant that the lien established by the Attorney's Lien Act is merely a right of action which is given to the attorney for the successful party, entitling him to proceed for his fees against the losing party. Of course, an attorney's lien is purely a creature of the statute and the statute must be followed in order that the lien may ripen into anything of value. According to the statute the lien "attaches to any verdict,

judgment, decree, or the proceeds of any settlement."

Needham v. Voliva, 191 Ill. App. 256. In Baker v. Baker, 258 Ill. 418, the court said that the attorney, by serving notice according to the statute, then becomes joint claimant with his client, in whatever decree may be rendered, and, that "to the extent of the amount of his fee the same interest in such * * * decree as his client and is entitled to his pro rata share thereof. In short * * * it has the effect of an assignment of an interest in any judgment or decree that may be rendered * * * and is such an assignment that the defendant or debtor is bound to respect. This creates a new and substantial right in favor of the attorney and divests the client of substantial rights that he theretofore possessed." Applying the language of the statute, "Shall attach to any verdict, judgment, or decree entered, and to any money or property which may be recovered", to the facts in the instant case, it follows that, notice having been duly served, appellees became the owners of a part of the decree, in other words, were in the same position as if Virginia Dreyfuss had definitely assigned to them a part interest in the decree itself. Further, as the decree itself was a lien upon certain real estate, appellees, by their ownership of a part of that decree, had a lien thereon. At the time of the service of the lien notice, the real estate in question was owned by Bessie Freud and Louis Grollman, and the fact that, subsequently, it was conveyed to the Alcons, does not destroy the lien of appellee but, on the other hand, merely means that the Alcons received the property subject thereto.

Some question is raised by appellant concerning the notice of lien which was served by appellee. We know of no case which goes so far as to hold, that where a

party in writing acknowledged he has received notice, he may subsequently successfully deny it. Alzada v. Gibson, 209 Ill. 246. Smith v. American Bridge Co., 194 Ill. App. 500. The decree in favor of Virginia Dreyfus was entered September 11, 1913, and included interest on \$2,000.00, from February 13, 1912. The amount of the decree, therefore, at the time it was entered, including interest up to the date of its entry, was \$2186.94; and the amount to which appellees were then entitled, being 15 per cent thereof, was \$329.83, to which should be added \$18.05, costs expended by appellees, making a total of \$357.88. The latter amount, together with interest from September 11, 1913, until the entry of the decree appealed from January 10, 1917, amounts to \$681.16.

Finding no error in the record the decree, modified in amount, is affirmed, and judgment will be entered here in favor of the appellees and against the appellants, in the sum of \$681.16 with interest on said sum at the rate of five per cent per annum from January 10, 1917, to this date.

W. L. HARRIS.

McMASTER-CARR SUPPLY CO.,

Appellee,

vs.

PHOENIX ELECTRICAL CO., a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 LA 347

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

This is an appeal from a judgment in the sum
of \$94.51 in favor of the appellee for merchandise sold
and delivered to appellant. The chief question on this
appeal is whether two engines which were delivered by
appellee to appellant were bought outright by appellant,
or were left with it only to be paid for when sold.
The evidence of Ausman, manager for appellee, that in
a conversation with the president of appellant, he quoted
him a price and the latter said to deliver one two and
one-half and one one and one-half horsepower to their
factory, and the evidence of Channon, president of the
appellee, that he talked with the president of the appell-
ant and asked him for the payment of the account of appellee,
and the president of appellant said that he could not
pay at that time, which was the latter part of August
or the first part of September, 1916; that he further
talked with him about raising money by selling the ac-
counts and also told him that appellee would wait if ap-
pellant would give a note; and the evidence of Wythe,

secretary and treasurer of appellee, that several times he sent their collector over and also talked to the president of appellant, over the telephone, and that the latter promised over the telephone, to pay the account before the first of July; and the evidence of Shulman that he called on the president of appellant on September 15, and the latter said that the appellant was doing a good business but was short of money and would pay one-half the account on October 1, and the balance on November 1,- all taken together, sufficiently supports the conclusion of the jury that appellant bought the merchandise in question, and was liable for the account. A letter dated June 4, 1916, from appellant to appellee, recites that the engines were placed on consignment and that appellant would remit as soon as they were sold, is some evidence of the claim of appellant, but is overwhelmingly contradicted by the evidence of appellee. Evidently there was no substantial controversy as to the items of the account as the president of the appellant testified, on cross-examination, that they would pay it (apparently meaning the account) as soon as they sold the engines.

Appellant objects to certain telephone communications which were received in evidence, but as the witness testified that the president answered the telephone and said he was Mr. Mack and, upon being asked for a payment of the account, answered that he could not pay at that time, but he would go over and see him, (which he did) the objection of appellant obviously is untenable.

Appellant further objects to certain testimony of one Shulman, that he called on Mr. Mack (president of

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appellant) and that he said that "the Phoenix Electrical Co., was doing a good business but was short of money and would pay one-half the account on October 1st and the balance November 1st." Appellant's objection is that it was inadmissible on the ground that the conversation involved an offer of compromise. An examination of the evidence shows that the statement by the president of appellant was not made as a hypothetical concession to invite or effect a settlement but was made as an express unconditional declaration of the following facts; that the appellant was doing a good business; that it was short of money and that it would pay one-half the account on October 1 and the balance on November 1. In the cases of Gehr v. The People, etc., 87 Ill. App. 158, and Barker, et al v. Bushnell, et al, 75 Ill. 220, the offers were made,- in the first case, to settle an unliquidated claim; in the second case to settle for much less than the value of the subject in controversy,- only with a view to a settlement by mutual concession. In the instant case, when the proposition was made, the president understood it to be, and made it, evidently, as an admission of liability and, therefore, whether accepted or rejected, it was competent evidence. Colburn v. Groton, 66 N.H. 151. Wigmore on "Evidence", Vol. 2, Sec. 1061.

The appellant, further, contends that errors were made by the trial court, in its charge to the jury. We are of the opinion that the instructions requested by appellant were properly refused by the trial judge upon the ground that they were not applicable to the evidence.

Finding no errors in the record the judgment is affirmed.

THOMAS C. WORDEN and
FASHION AUTOMOBILE STATION,
a corp.,

Appellees

vs.

DENNIS J. NOLAN and
SYDNEY W. ANDERSEN,

Appellants

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT,
COOK COUNTY.

209 I.A. 348

MR. PRESIDING JUSTICE TAYLOR delivered the
opinion of the court.

This is an appeal from an interlocutory order of injunction entered on September 5, 1917, enjoining one Sydney W. Andersen, and any corporation controlled by him, from employing or using the services of the defendant, Dennis J. Nolan, "as partner, officer of Company, superintendent, manager, agent, servant or employee in carrying on an automobile station or automobile garage business at the corner of Fifty-sixth street and Lake Park avenue, or at any place between Forty-sixth street on the north, Lake Michigan on the east, Sixty-first street on the south and Cottage Grove avenue on the west", and enjoining the said Dennis J. Nolan from in any way becoming connected with any garage business within the aforesaid inhibited area.

The cause was heard before the Chancellor upon a sworn bill of complaint and amendment thereto, and the affidavits of Dennis J. Nolan and Sydney W. Andersen, appellants. On and prior to January 26, 1917, appellant, Dennis

J. Nolan, owned and operated, at 1600 East Fifty-third street, an automobile garage under the name of "Fifty-third street Automobile Garage", which was the only automobile garage at that time between Fifty-first street on the north, Fifty-seventh street on the south, and east of the Illinois Central Railroad tracks. At the same time, one Thomas C. Worden, appellee, was a stockholder in the Fashion Automobile Station (one of appellees), which was the owner of and operating two garages, one at 740 East Fifty-first street, and the other at the corner of Fifty-third street and Lake Park avenue. The appellants being desirous of purchasing the business and good-will of the Fifty-third street Automobile Garage, procured one Abraham Rose to negotiate with appellant, Dennis J. Nolan, for the purchase of the Fifty-third Street Automobile Garage, together with the leasehold of the premises and the goods, chattels, personal property and good-will of said business. Accordingly, on January 22, 1917, Abraham Rose procured from Nolan, an option for the purchase of the business, good-will, leasehold and personal property, for the sum of \$20,000., which option was as follows: "For and in consideration of the sum of \$100., amount paid to me in hand, the receipt whereof is hereby acknowledged, I, D. J. Nolan, hereby give to Abraham Rose, an option to purchase on or before five days from the 22nd day of January, 1917, the leasehold, good-will, contents, appliances and appurtenances of garage known as the Fifty-third Street Automobile Garage at 1600 Fifty-third Street, for the sum of \$20,000. Witness my hand and seal at Chicago, Illinois, this 22nd day January, 1917. D. J. Nolan (Seal). Abraham Rose."

At the time the option was given and the sum of

\$100 paid, Dennis J. Nolan gave a written promise as a part of the said option contract and as a part of the consideration for the sale and purchase of the goods and chattels, etc., which is as follows: "I agree not to enter into the garage business between the boundary of Forty-sixth street north, Sixty-first street south, Cottage Grove avenue west, Lake Michigan east, within two years from date. D. J. Nolan." The next day, being January 23, 1917, Thomas C. Worden (one of the appellees) informed Denis J. Nolan that Abraham Rose "had entered into the said contract for the purchase of said garage" etc., for and on behalf of the Fashion Automobile Station (one of the appellees), which intended to carry on its business under the name of "Fifty-third street Automobile Garage" at 1600 east Fifty-third street, and that the option should be assigned to Worden for and on behalf of the said Fashion Automobile Station. In pursuance of that arrangement, there was executed upon the same page of the said option, an assignment of the said option and agreement to said Worden, which is as follows: "January 26, 1917, For a valuable consideration, duly paid to me in hand, the receipt whereof is hereby acknowledged, I hereby assign, transfer and set over to Thomas C. Worden, all my right, title and interest in and to the foregoing instrument", which assignment was duly signed and sealed by Abraham Rose and witnessed by A. L. Rittenberg. The assignment was made with the knowledge and consent of the said Dennis J. Nolan and was signed in his presence by Abraham Rose.

On January 26, 1917, Thomas C. Worden, that is, agent of the Fashion Automobile Station, delivered in escrow

a check for the sum of \$20,000., in payment of the purchase price of the business, etc., and Dennis J. Nolan signed and delivered in escrow a bill of sale, which, in consideration of \$1. grants, bargains, sells and delivers to Thomas C. Worden, certain personal property located at the Fifty-third Street Automobile Garage. The bill of sale recited "that all accounts receivable, in connection with above mentioned garage, up to and including January 31, 1917, shall be the property of Dennis J. Nolan"; further, "that Thomas C. Worden does not assume or become liable for any of the indebtedness or liabilities of Dennis J. Nolan."

The bill of complaint recites that Dennis J. Nolan had been in the automobile garage business at 1600 East Fifty-third street for a period of about six years and had secured the good-will and business of a large number of customers in that vicinity and when the good-will of the said business, together with certain personal property and leasehold, was purchased from him, he was informed that the Fashion Automobile Station intended to carry on a similar business upon the same premises and that it could not be carried on successfully and profitably if he should establish or become connected with a competing business in that vicinity; and that that was the reason for procuring, from him, an option on the purchase of the personal property and good-will of the business and requiring him to enter into an agreement not to enter into the garage business within the territory specified. The value of the personal property which was purchased was, according to the bill of complaint, not over \$500., and according to the affidavits, \$3,000.00, the balance of the \$20,000.,

being paid for the good-will and established business at 1600 East Fifty-third street.

Dennis J. Nolan, upon receiving the \$20,000., thereupon associated himself in business with one Sydney W. Andersen, who carried on a bond investment business in the city of Chicago under the name of "Continental Investment Company of Illinois," which business they are still engaged in.

On or about the 27th day of August, 1917, appellant, Andersen, together with one Phillip L. Mathiesen, took an option to purchase a certain garage known as the Elite Garage at Fifty-sixth street and Lake Park avenue, within the inhibited territory described in the agreement in question. Andersen, Mathiesen and one P. N. Clark, organized a corporation under the name of "Continental Garage Company, all the stock of which was owned by them. It is admitted that Nolan was to become an employee, as its manager, at a fixed salary.

It is claimed by appellees that Nolan and Andersen have combined together to injure and destroy the business of appellees, now carried on at 1600 East Fifty-third street, and that if they are permitted to carry on and operate a garage at Fifty-sixth street and Lake Park avenue, with Dennis J. Nolan as owner or proprietor or agent, or manager, the result will be to greatly injure and impair the business of appellees at 1600 east Fifty-third street. In the bill of complaint it is alleged that both appellants, Dennis J. Nolan and Sydney W. Andersen, told Thomas C. Worden, appellee, that the Elite Garage had



been purchased by Anderson and that he intended to place Dennis J. Nolan in charge and control of the business as the active manager. That, however, is denied by Dennis J. Nolan, but it is admitted by him that he was to become "the manager thereof, on a salary, but was to have no other financial interest therein."

It is contended by the appellants that the promise of Nolan "not to enter into the garage business" etc., which is the basis of the relief asked by the complainants is not^a binding obligation because (1) the offer to Rose was not accepted by him; (2) the attempted assignment of the rights of Rose was ineffectual and (3) even if Worden succeeded to the rights of Rose as to the option, he did not accept Nolan's offer of the supposed negative covenant. Inasmuch as it is alleged and not denied that Worden procured Rose to negotiate with Nolan for the purchase and that after the purchase of the option, Worden called upon Nolan and informed him that the option should be assigned to Worden on behalf of the Fashion Automobile Station and the assignment by Rose was made with the knowledge and consent of Nolan, the conclusion follows that a proper legal assignment of the written promise of Rose was made and that Worden (on behalf of the Fashion Automobile Station) succeeded to the rights of Rose as to the option.

It is further contended that the placing of the \$20,000. in escrow, together with the bill of sale, constituted a new contract and that as a result thereof, the option became extinguished. Appellant Nolan, however, in his affidavit admits that on or about January 26, 1917, the date of the assignment to Worden "he sold and conveyed said gar-

age" "as set forth in said bill of complaint and that at the time of said sale, he executed and delivered the agreement not to enter into the garage business" etc. Obviously the sale was made as alleged in the bill of complaint and the promise "not to enter into the garage business" was understood as and constituted one of the existing binding obligations on Nolan and one of the component parts of the ultimate contract consummated by the parties. Temporarily, the escrow may have held some mutual rights in abeyance but when concluded and consummated by delivery, and the whole contract to that extent executed, there still remained outstanding the binding promise of the appellant Nolan "not to enter into the garage business."

It is further contended by the appellants that even though Nolan intended to become the manager of the Elite Garage "on a salary, but was to have no other financial interests therein" becoming manager would not constitute a breach of the contract "not to enter into the garage business" etc. Bearing in mind that Nolan had been paid \$20,000. for the business and its good-will, of which at least \$17,000. was paid for the good-will alone, it would seem to be unreasonable to conclude that the words "not to enter into the garage business between the boundary" etc., did not mean that he could not "become manager * * * on a salary" of another garage business within the inhibited territory. Certainly it would be altogether possible that Nolan as manager of another garage in that territory might completely destroy the good-will which he had sold and for which he had received a large consideration. To allow him to act as manager would be allowing him to break his promise, to do indirectly in the name of others what he was not entitled to do in his own name.

The injury to the appellants under such circumstances might be quite as serious as if Nolan were allowed to conduct the new business entirely as his own. Certainly the letter and spirit of his obligation, if he were allowed to act as manager, would be just as surely violated as if he were the owner himself. The law will not give immunity to Nolan when he undertakes, by circumlocution, to violate his promise and damage the appellees. That he may have had no expectation of making any profit beyond his salary, is of no importance. He had expressly promised "not to enter into the garage business" within the inhibited area. Alcock v. Alcock, 267 Ill. 422; Flaherty v. Libby, 108 Me. 377. Pittsburg Stove Co. v. Penn. Stove Co., 208 Penn St. 37; Merica v. Burget, 36 Ind. App. 453; Finger v. Hahn, 42 N. J. Eq. 606; Geiger v. Crawley, 146 Mich. 550; Wilson v. Delaney, 137 Ia. 636; Jefferson v. Markert, 112 Ga. 498; Ryan v. Hamilton, 205 Ill. 191; Ranft v. Reimers, 200 Ill. 386. We are of the opinion that to install Nolan as manager of a competing business located within the inhibited territory would be a violation of his obligation. An analysis of the case of Battershell v. Bauer, 91 Ill. App. 181, discloses that it is not in conflict with the foregoing conclusion.

With respect to the terms of the order of injunction, counsel for appellants complain that it wrongfully enjoins Andersen. Inasmuch as Andersen admits that he told Worden "he was about to purchase said garage", (meaning the Elite Garage) and, further, that he and Mathison (who subscribed for 749 shares, out of 750 of the capital stock of the Continental Garage Company) "requested that said Nolan become the manager of said garage in the event that said purchase should be made", we are of the opinion

that the action of the chancellor was entirely justified. Further, complaint is made as to the extent of the restraint of Nolan, on the ground that the injunction is too broad. Having in mind, however, the purpose of the injunction and the purpose of the chancellor, under such circumstances, we are of the opinion that the decree, as entered, was entirely proper. The decree, therefore, is affirmed.

AFFIRMED.

260 - 23226

C. W. MARKS SHOE COMPANY,
a corporation,

Appellant.

vs.

B. BROTHMAN,

Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 356

MR. JUSTICE O'CONNOR delivered the opinion of
the court.

This is an undefended appeal prosecuted by the
C. W. Marks Shoe Company, plaintiff, from a judgment of
the Municipal Court of Chicago in favor of B. Brothman,
defendant, in a replevin suit.

The record discloses that defendant was con-
ducting a small retail shoe store in Chicago; that she
had been purchasing shoes from plaintiff; that there was
a balance of \$200 due plaintiff and thereupon it refused
to extend her further credit. Thereafter the parties
entered into an agreement, plaintiff's version of which
was that it would supply the defendant with shoes, but
that the title to the shoes should remain in the plain-
tiff, and that they should be delivered to the defendant
upon consignment only; that when the shoes were delivered
to defendant from time to time she was to pay in cash an
amount equal to the price of the shoes then delivered,
the same to be applied by plaintiff on the old balance
of \$200. The defendant's position was that plaintiff refused
to extend further credit to her and thereupon an agreement
was entered into whereby she was to pay cash for the shoes

purchased by her.

Afterwards defendant conducted her shoe store for some years and obtained her stock of shoes from time to time from plaintiff, each time paying in cash, sometimes the amount of the purchase and sometimes not. Plaintiff introduced evidence that tended to sustain its theory of the agreement, viz., that the property was delivered to the defendant on consignment, the title remaining in the plaintiff. On the other hand defendant introduced testimony tending to sustain her theory that the goods were not delivered to her on consignment, but that she purchased them from time to time. It thus appears that the evidence on the material point in the case was conflicting. The court saw and heard the witnesses and was in a much better position to judge of the facts than we are, and after a careful consideration of the entire record, we are unable to say that the finding of the court that the right to the possession of the property replevined was not in the plaintiff, was not justified by the evidence.

The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

274 - 23240

OTTO G. RYDEN,

Appellee.

vs.

HARRIET C. HASTINGS, by
William G. Wise, her conservator,

Appellant.

APPEAL FROM

CIRCUIT COURT.

COOK COUNTY.

209 1A 67

MR. JUSTICE O'CONNOR delivered the opinion of the court.

Otto G. Ryden brought suit against Harriet C. Hastings before a justice of the peace in Evanston, Illinois. There was a judgment in his favor for \$200. An appeal was taken to the Circuit Court of Cook County, where a trial was had before the court and jury. There was a verdict in favor of plaintiff for \$200, and judgment was entered, to reverse which defendant prosecutes this appeal.

The record discloses that plaintiff was an attorney practicing law in Chicago; that the defendant was an old lady about eighty-three years of age, and was in California. With her at that place was her niece, Mrs. Jennie C. Donnan, who was the mother-in-law of plaintiff. The defendant and Mrs. Donnan were returning from California to Evanston in April, 1914, and were to stop off at Kansas City, where the defendant had had for many years several business transactions, her business there being looked after by a Mr. Sills. Mrs. Donnan wrote plaintiff requesting that he come to Kansas City to look over defendants business affairs there. Thereupon plaintiff proceeded to Kansas City, met the defendant

and Mrs. Donnan, called on Mr. Sills and requested the latter to show him the various mortgages held by Mr. Sills for defendant, and also a copy of defendant's will which had been prepared some time before. Sills refused to permit plaintiff to examine these papers without authority from defendant, and thereupon Sills conferred privately with defendant and informed her of the request made by plaintiff. After some hesitation defendant told Sills that he might permit plaintiff to examine the papers. Plaintiff made a list of the mortgages, etc., and a copy of the will, and returned to Chicago. Afterwards defendant arrived in Evanston where she remained for some time, when a conservator was appointed for her. While in Evanston, plaintiff claims to have rendered her certain legal services, which are included in the judgment. After the conservator was appointed this suit was brought.

Plaintiff was disqualified as a witness under the statute, but he produced his books which showed that he had made certain charges against the defendant. An attorney testified as to the reasonable value of the services claimed to have been rendered as shown by his books, and another attorney testified to the reasonable value of the services claimed to have been performed by plaintiff in Kansas City. Three days were spent by plaintiff for the Kansas City trip.

The defendant contends that the evidence clearly shows that the services performed in Kansas City by plaintiff were at the sole instance and request of plaintiff's mother-in-law and were not performed for defendant; that the defendant merely permitted an examination of the papers

at the request of plaintiff's mother-in-law, and for the benefit of the latter, and plaintiff's family. The only evidence on this point is the depositions of plaintiff's mother-in-law and Mr. Sills. It is clear from this evidence that the services performed in Kansas City were not for the benefit of the defendant, but were rendered at the request of plaintiff's mother-in-law and for her benefit. Therefore the defendant is not liable for these services.

As to the services subsequently rendered in Evanston, there is some evidence that tends to show that they were at the request of and for the benefit of the defendant. But as we are unable to ascertain the charge made for these services, the error cannot be cured by a remittitur.

The judgment of the Circuit Court of Cook County is reversed and the cause remanded.

REVERSED AND REMANDED.

310 - 23276

JOHN G. CRAIG,

Appellee.

vs.

AUGUST V. PELLET, doing business
as Pellet's Magneto Exchange.

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2091A-308

MR. JUSTICE O'CONNOR delivered the opinion
of the court.

John G. Craig brought suit in the Municipal Court
of Chicago against August V. Pellet, doing business as
Pellet's Magneto Exchange, to recover \$175. The case was
tried before the court without a jury and judgment was
entered in favor of plaintiff for the amount of his claim.

The record discloses that September 4, 1915,
plaintiff purchased from defendant ignition and lighting
systems for plaintiff's automobile. The contract was in
writing and, so far as material, provided that the defendant
was to install in plaintiff's automobile "one Gray & Davis
Dynamo System" for \$175. Afterwards defendant installed
the two systems. The ignition system was found satisfactory,
but the lighting system failed to work properly, and in
about five days plaintiff returned to defendant and complained
that the lighting system was unsatisfactory. The car was
returned from ten to fifteen times by plaintiff to the de-
fendant for correction of the lighting system, but it appears
that defendant was never able to make it work satisfactorily.
The plaintiff tendered back the lighting system and demanded

the return of \$175. Upon refusal this suit was brought.

Witnesses for the plaintiff testified that the lighting system was worthless. Plaintiff contends that the alleged written contract was merely a memorandum and did not purport to cover the entire transaction; that it was incomplete and ambiguous and therefore parol evidence was admissible "to complete and explain it." We think the contract was complete as written, and no parol evidence was admissible.

Plaintiff further contends that after it was found that the lighting system would not work properly when he returned to the defendant to have the error corrected, the defendant agreed to do so, and that under this subsequent agreement defendant was bound to cure any defects in the system. We cannot concur in this contention, for the reason that this agreement was without consideration.

The defendant contends that as the contract was in writing and was silent on the subject of warranty, no warranty could be implied. In support of this contention a number of authorities are cited, all of which we have carefully examined. In most of the cases cited the question here presented was not involved, but the ruling there was on the admission of evidence and it was merely held that parol evidence could not be introduced to show a warranty where none was expressed in the written contract. This is undoubtedly a correct rule. The court, however, in Ramming v. Caldwell, 43 Ill. App. 175, cited by defendant, used language which supports defendant's position. The general rule, however, is well established by authorities that warranties may be implied when the contract is in writing as well as when it is oral. Lidgerwood Mfg. Co. v.

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Robinson & Son Cont. Co., 183 Ill. App. 431; Blackmore v. Fairbanks, Morse & Co., 79 Ia. 282; Ideal Heating Co. v. Kramer, 127 Ia. 137; Cooper v. Payne, 103 N. Y. (App. Div.) 118; Carlston v. Lombard, Ayres & Co., 149 N. Y. 137; Boothby v. Scales, 27 Wis.626. We think this is the better rule. A written contract of sale is construed the same as any other written contract, and it is certain that in construing written contracts many things are implied as a matter of law. The implied warranty is an obligation imposed by law. Williston on Sales, 322.

But in the instant case, plaintiff purchased one Gray & Davis Dynamo System. This system was delivered to him. He did not trust to the judgment or skill of the defendant, but so far as the record shows was as familiar with this system as the defendant. In these circumstances there was no implied warranty that the lighting system was reasonably fit for the purpose to which it was to be applied. Fuchs & Lang Co. v. Kittredge & Co., 242 Ill. 83. In that case the court said (97): "Where a known, described and definite article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and definite article be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. In a contract for the sale of an article under its patent or other trade name there is an undertaking that the article delivered shall be of the kind ordered but not that it shall be fit for any particular purpose. If the buyer gets what he bargained for, there is no implied warranty though it does not answer his purpose." This harsh

rule of law was not corrected until the Legislature passed the Uniform Sales Act in 1915, which was after the contract was executed in the instant case. Since the plaintiff purchased a definite article and the same was furnished to him, there was no implied warranty that it would answer the particular purpose intended by the buyer, and he was therefore not entitled to recover.

The judgment of the Municipal Court of Chicago is reversed.

REVERSED.

342 - 23308

JOHN E. TRAEGER, Sheriff, for use
of M. L. Greenwald,

Appellee.

vs.

C. B. SHAFFNER and JOSEPH M. LEVEE,

Appellants.)

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

209 I.A. 869

MR. JUSTICE O'CONNOR delivered the opinion of the court.

This is a suit on a replevin bond brought by John E. Traeger, Sheriff, for use of M. L. Greenwald, against C. B. Shaffner and Joseph M. Levee. There was a judgment against the defendants for \$400, to reverse which they prosecute this appeal.

Defendants contend that the cause was improperly placed on the short cause calendar, for the reason that the statute requires an affidavit to be filed, which was not done, but merely a certificate by counsel for plaintiff that in his opinion the trial would not consume more than one hour's time.

The record discloses that on the 31st day of October, 1916, plaintiff served notice on the defendants that on the following day he would ask that the cause be placed upon the short cause calendar for trial, and in support of the motion counsel for plaintiff certified under oath that he verily believed that the trial would not occupy more than one hour's time. On the 12th of December following, the case was on the trial call for

that day. Thereupon defendants moved to strike the cause from the short cause calendar, on the ground that the statute provides that before a cause shall be placed upon the short cause calendar, an affidavit must be filed and that no such affidavit had been filed. The motion was denied, and on the following day the cause was actually reached for trial. The defendants made a similar motion then, which was likewise overruled. Section 27 of the Practice Act provides that when any party to a suit, his agent or attorney, shall file an affidavit with the clerk of the court that he verily believes the trial of the case will not occupy more than one hour's time, the clerk shall place the case upon the short cause calendar. Defendants contend that no affidavit was filed, but only a certificate. There is no complaint that the certificate was not under oath. While the certificate which was sworn to by counsel for the plaintiff might be subject to the objection, yet the defendants, to take advantage of this, should have moved to strike the cause from the short cause calendar at the earliest opportunity, as such motions are of a dilatory nature. The motion not having been made until the case was reached for trial, came too late. McDonald v. People, 222 Ill. 325; Haines v. Thompson, 129 Ill. App. 436.

Complaint is also made that the court should have stricken the cause from the short cause calendar, for the reason that it took two days to try the case. There is nothing in the record that would warrant us in holding that two days were taken up in the trial. The record discloses that a jury was impanelled on the 13th, and a verdict was returned on the following day. For aught that appears the trial might not have taken more than one hour's time.

But in any event it was within the discretion of the court to continue the trial, even though more than one hour's time was necessary.

The judgment of the Circuit Court of Cook County is affirmed.

AFFIRMED.

224 - 23190

C. L. HARTWELL, doing business
as C. L. HARTWELL & COMPANY,

Appellee,

vs.

CRANE & MACMAHON, Inc., dealing
as the Virginia & North Carolina
Wheel Co.,

Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 399 6000

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is a suit for attachment brought by the
appellee, hereinafter referred to as the plaintiff,
against the appellant, hereinafter referred to as the
defendant, to recover upon an open account. The trial
was held in the court below without a jury and the court
found the issues for the plaintiff and entered a judg-
ment in his favor for \$577.20 and costs from which de-
fendant has appealed.

As far as it is necessary to state them, the
facts involved are as follows: The plaintiff, whose place
of business was at Chicago Heights, Illinois, and who owned
and operated a lumber mill at Houston, Mississippi, wrote
to the defendant, an Ohio corporation, which operated a
factory in Richmond, Virginia, where they manufactured
buggy wheels, under date of March 27, 1914, stating that
they had at their mill at Houston a large carload of
hickory strips, "which were sawn 1 5/8", 1 1/2" and 1 3/8"
square * * * and ^{will} quote you on this at \$55.00 per # ft.

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delivered F.O.B. cars at our shipping station, terms: Cash as soon as received and inspected. About 90% of these strips would run to 1 5/8" size and the balance about equally divided between 1 1/2" and 1 3/8"." Under date of March 31, 1914, the defendant replied, acknowledging receipt of plaintiff's letter of March 27th saying, in effect, that the freight rate was such as to put the material offered out of their reach at the price named. The letter then proceeded, "We are willing, however, to try the car which you have at \$50.00 per # ft., provided it will run 90% 1 5/8" square. The remaining 10% in 1 1/2" and 1 3/8" square we can handle * * *. This price is for timber run stock * * * subject to inspection here at Richmond." This letter had something to say with regard to the desired lengths of the different sized strips which we deem immaterial to the issues. Plaintiff received this letter April 2, 1914, and a few days later wrote the defendant acknowledging receipt of this letter of March 31st and saying, "We have concluded to ship you the car of rim strips as per our letter of March 27th and we will send you invoice and bill of lading later." On April 15th, the plaintiff mailed to the defendant a bill of lading and invoice calling for 7,947 pieces of hickory. The carload arrived at Richmond April 23, 1914, and was inspected almost immediately by the defendant's manager, Mr. Morrison, and later by four other representatives of the defendant, all of whom reported that the sizes were smaller than those ordered, whereupon the defendant refused to accept the material and immediately notified the plaintiff to that effect, and, after some correspondence between the parties, the plaintiff brought this suit to

recover the purchase price of \$50.00 per # ft.

Practically all the testimony in this case was by deposition and, therefore, the rule that the trial court was in a better position to weigh and judge the testimony of the witnesses, than the court of appeal because of the trial court's opportunity to observe the witnesses on the stand, does not apply.

There are two questions involved here. First, "What was the contract between the parties? , and second, Has the plaintiff complied with the terms of that contract? As to the first proposition, plaintiff's letter of March 27th was an offer to sell a lot of then existing hickory strips amounting to "a large car load" and which, the offer specifies, had been "sawn 1 5/8", 1 1/2" and 1 3/8" square" and of which, the offer further states, about 90% "would run to 1 5/8" size and the balance about equally divided between 1 1/2" and 1 3/8". By this letter the plaintiff offers this material at \$55.00 per # ft. F.O.B. Houston. The defendant does not accept the plaintiff's offer but instead he comes back with a counter offer, which is to buy "the car which you have at \$50.00 per # ft. provided it will run 90% 1 5/8" square." and defendant further specifies in his offer that it is to be "subject to inspection here at Richmond."

The plaintiff does not, in so many words, accept defendant's counter-proposition but on April 8th writes defendant in response to the counter-proposition, saying, "We have concluded to ship you the car of rim strips as per our letter of March 27th". By this letter of April 8th plaintiff either accepted defendant's counter-proposition or made an entirely new offer. If it is construed to be

the latter, there never was a contract between the parties. This letter of the plaintiff's must be construed to be the former, namely, an acceptance of defendant's counter-proposition. He followed this letter up by shipping the strips and billing them to the defendant at the price named in the counter offer ~~which was the latter and not at the price~~ and not at the price he had named in his original proposition. His course of conduct shows conclusively that he accepted the terms of the counter proposition the defendant had made. Therefore, it seems clear that defendant's letter of March 31st and plaintiff's letter of April 8th make up the contract between the parties. Under the terms of the contract, the defendant undertook to buy a carload of hickory strips then in existence at a price stipulated, provided the material in question, upon inspection after it had reached Richmond, proved to be of the specified quality and provided on such inspection "it will run 90% 1 5/8" square."

It is contended by the plaintiff that the contract was not for a carload of hickory strips which would prove to be 1 5/8" square when inspected at Richmond but which had been sawn 1 5/8" square and that the terms of the contract had been fulfilled by the plaintiff provided it could be shown that the strips had been cut 1 5/8" square, although the shrinkage may have brought the pieces under that size at the time of inspection. This contention is based upon the supposition that plaintiff's letter of March 27th, together with defendant's reply, make up the contract which we do not consider to be the case. In reply to plaintiff's letter of March 27th, defendant makes an entirely new proposition, changing the price and specifically making this

offer to buy subject to inspection at Richmond and conditioned upon the fact that the pieces "will run 90% 1 5/8" square." In accepting the defendant's counter-proposition, the plaintiff closes a contract by which the defendant undertakes to purchase, and the plaintiff undertakes to sell, a carload of hickory strips, not that have been sawn 1 5/8" square, but that will run 90% 1 5/8" square on inspection at Richmond.

That being the contract, did the material comply with its terms? A number of witnesses testified for the defendant as to what the inspection showed when the car arrived at Richmond. The only witness for the defendant who examined all the strips was the witness, E. T. Robinson, an inspector of the National Hard Wood Lumber Association who was requested by the plaintiff in this case to inspect this carload of strips some months after it had been rejected by the defendant. He was, as far as the record discloses, an entirely disinterested witness. The plaintiff contends that the testimony of this witness cannot be relied upon because it is not shown that the strips were in the same condition in the fall of 1914, when he inspected them, as they were when they arrived in Richmond in April of that year. The testimony discloses that the quantity of strips as inspected by this witness was practically the same as that which the plaintiff invoiced, the latter being 7947 and the Robinson count showing 7927 pieces. Plaintiff further contends that this testimony is not reliable because the strips had been in Richmond throughout the hot summer and had doubtless shrunk during that time. As to this contention, the testimony of Robinson is to the effect that when he measured these strips they were still only half

dried and that it would take a year for strips like those to dry out completely. He states, further, that from his examination of these strips, they had been in the car with the door closed the entire length of time. When he inspected them they were not in the car in which they had arrived in Richmond, having been shifted from one car to another by the railroad company. Robinson testified that the strips had not dried out as much as they would have if they had been properly piled in the air. It is further in evidence that these strips had been out a considerable length of time before shipment. Plaintiff's letter of March 27th says, "They have been on hand for some time and the timber would be dried out to some extent." From this evidence we believe the strips were shown to have been in substantially the same condition when Robinson measured them that they were in when they arrived in Richmond. His testimony is that only about 25% measured 1 5/8" square.

This testimony corroborated that of a number of other witnesses who had inspected this car very shortly after its arrival at Richmond but who had measured or inspected only a limited number of pieces of the hickory, whereas Robinson had inspected and measured every piece in the car. The only testimony to the contrary was that given by the plaintiff's superintendent at Houston to the effect that all the strips had been cut 1/16" to 1/8" full.

This amounted to a substantial failure of the fulfillment by the plaintiff of the terms of the contract which were set forth by the defendant in its letter of March 31st, and, although the material had been delivered to the defendant at the time and point of shipment, that

delivery, under the terms of the contract, was subject to inspection at destination, and, under the terms of the contract, the defendant was entitled to refuse to pay the contract price. It was therefore error on the part of the court below to refuse to hold the proposition tendered by the defendant to the effect that under the terms of the contract between the plaintiff and the defendant the plaintiff was bound to furnish the defendant a carload of hickory strips substantially 90% of which, when inspected at Richmond, Virginia, would measure 1 5/8" square before defendant was obliged to pay the contract price.

We do not deem it necessary to go into the other errors assigned. The cause is reversed.

REVERSED.

236 - 23202

EDWARD GANS,

Appellee,

vs.

LINCOLN STARS, a corporation,
et al On Appeal of Lincoln
Stars, a corporation.

Appellant.

APPEAL FROM

MUNICIPAL COURT

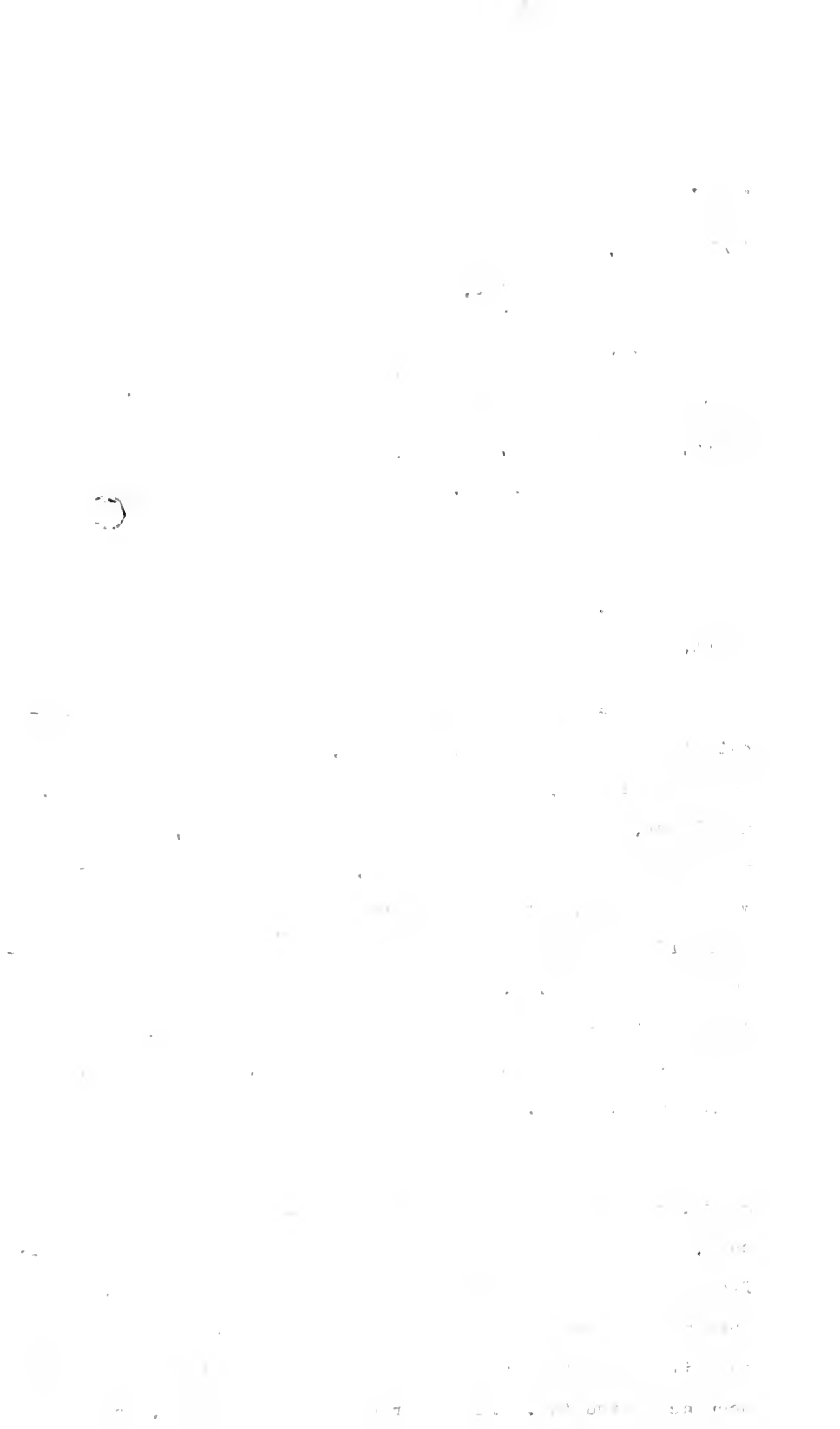
OF CHICAGO.

209 I.A. 400

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an attachment suit brought in the Municipal Court by Edward Gans, appellee, hereinafter referred to as the plaintiff, against the Lincoln Stars, a corporation, appellant, hereinafter referred to as defendant, whereby said plaintiff sought to recover, under an alleged contract with defendant, for his services rendered as a baseball player plaintiff claiming that there was due him for services rendered the sum of \$53.53. The case was tried below without a jury and the court entered a finding for the plaintiff and a judgment for the full amount with costs. The appeal is from that judgment.

The statement of claim filed by plaintiff alleges a written contract between the parties. On the trial of the case, the plaintiff was a witness and produced what he testified to be a correct copy of the contract in question. When this was offered in evidence, defendant objected on the ground that it was secondary evidence and that the original had not been accounted for. In the argument which ensued, as shown by the record, it appeared that, on the Saturday before this case came to trial, the parties had been in court on a mo-



by the plaintiff for an order directing the defendant to produce the original contract at the trial, and counsel for defendant, referring to the notice served on him in connection with that motion said, "That was a notice to ask the court to compel us to produce something which we have not got and we deny that it ever existed." A statement in open court by a party to the case or his counsel to the effect that the original of any document in question is not in his possession and further denying the existence of such a document is a sufficient accounting for the original of the alleged document to permit the introduction of secondary evidence upon it in the shape of an alleged copy. Fowler Paper Co. v. Bert Jones, 183 Ill. App. 310. It was not error to overrule the objection that was made to the introduction in evidence of the paper alleged to be a copy of the contract involved in the case. When this alleged copy was produced and admitted in evidence, it was not a copy purporting to have been signed by the defendant or anybody in its behalf. The plaintiff testified that this copy introduced in evidence had been given to him by Mr. Lloyd and that Mr. Lloyd was employed by the defendant corporation as manager of the team. Plaintiff further testified that he performed services for the defendant ^{the} under/contract from the first of May to the last of September and he was proceeding to testify on the matter of the services rendered, as set forth in the statement of claim, when counsel for defendant objected to any further testimony in the absence of the written contract, alleging that it was incumbent upon the plaintiff to prove the written contract and contending that they could not allege on a written contract in a statement of claim and prove up an

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oral agreement. The objection was overruled. Counsel for defendant then stated if that was the case "We won't waste any further time except to pray a bill of exceptions. We stand on the proposition that they have not produced the written contract signed by both parties as alleged in their declaration." Thereupon the court found for the plaintiff and entered a judgment for the full amount claimed.

While this was a rather loose way of terminating the trial, we cannot say it was reversible error to do so. The court was clearly correct in overruling the objection. This was a case of the fourth class where formal pleadings were not essential. In such cases, of course, the statement of claim filed must set forth a cause of action.

Enberg v. City of Chicago, 271 Ill. 404, 411; Gillman v. Chicago Railways Co., 268 Ill. 305. The statement of claim involved here does set forth a cause of action. As to this class of cases the rule governing the question of a variance is the same as that which controls in actions before justices of the peace. Edgerton v. C. R. I. & P. Co., 240 Ill. 311. In suits before justices of the peace the action is what the proof makes it. Doherty v. Schipper & Block, 157 Ill. App. 413, 422. In the Edgerton case supra, the statement of claim set forth a good cause of action in contract. The suit was against three defendants and, after the hearing of the evidence, the suit was dismissed as to two of the defendants. It was conceded that if the action were an action on contract, on the facts as proved, the judgment would have to be against all the defendants or none and that, in order to have the judgment stand as against

the one defendant remaining in the case, the action must be held to be one in tort. The court held that, inasmuch as the action was one of the fourth class, under the Municipal Court Act where no written pleadings are required, the judgment could be sustained as a judgment in tort against the defendant who remained in the case. While the objection made by the defendant here to an alleged variance between the statement of claim and the proof might have been good, under common law pleadings, it is not a point that can be raised in a fourth class case in the Municipal Court where written pleadings are not required. The statement of claim in this case sets forth a good cause of action; the proof which was submitted on the trial of the case made out a good cause of action, and although the statement declared on a written contract and the proof disclosed an oral contract or one that might be considered partly oral and partly written, nevertheless the plaintiff may recover.

In view of the action of counsel for defendant on the trial as set forth above, this is practically the only question involved here.

Defendant does raise the further point that there is no evidence to sustain either ground for attachment as alleged by plaintiff in his affidavit for attachment, and therefore, outside of the question of the merits of the case, the attachment should not have been sustained. As to this, it need only be pointed out that the affidavit for attachment alleged two statutory grounds, only one of which was denied by the defendant in its traverse. The

other ground alleged was thereby admitted which is sufficient to sustain the judgment for attachment. Hopkins v. Medley, 97 Ill. 462; Simmons v. Jenkins, 76 Ill. 479; Lettick v. Hennock, 63 Ill. 335; Williams v. Boyden, 33 Ill. App. 477; Douglas v. Watson, 35 Ill. App. 538; Richardson v. Gilbert, 135 Ill. App. 363.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

CHESTER A. HARRIS and
JOHN M. DILLAVOU, doing
business under the name
and style of HARRIS &
DILLAVOU,

Appellees.)

vs.

D. S. WILLIS, doing business
under the name and style of
D. S. WILLIS COAL CO.,

Appellant.)

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

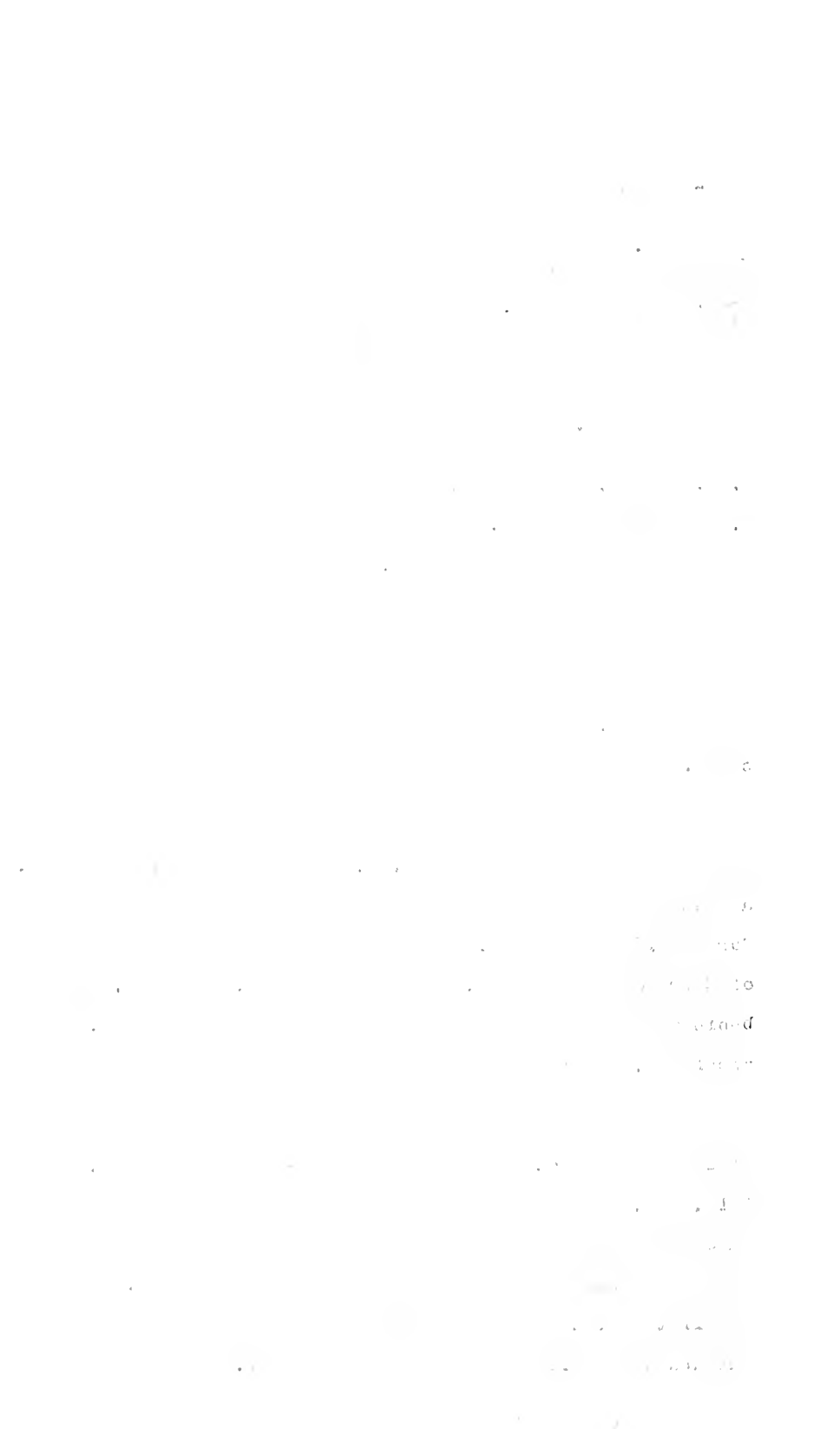
203 I.A. 401

MR. JUSTICE THOMSON delivered the opinion of the
court.

This is an appeal by D. S. Willis, doing business
under the name and style of D. S. Willis Coal Co., appellant,
hereinafter referred to as the defendant, from a judgment
for \$304.35 recovered in the Municipal Court of the City
of Chicago by Chester A. Harris and John A. Dillavou, doing
business under the name and style of Harris & Dillavou,
appellees, hereinafter referred to as the plaintiffs.

The defendant filed an amended affidavit of
merits and an amended statement of set-off on Sept. 14,
1916, and, on motion of the plaintiffs, the court entered
an order striking both the amended affidavit of merits
and the amended statement of set-off from the files. It
is first contended that the court erred in striking the
amended affidavit of merits from the files.

To properly present the correctness of this
ruling of the Municipal Court for review, the defendant



should have preserved the affidavit of merits and the ruling of the court thereon in his bill of exceptions. Not having done so, we must presume that the court properly struck the affidavit of merits from the files. Barger v. Hobbs, 67 Ill. 592, 597; Mann v. Brown, 263 Ill. 294; Harmon v. Callahan, 22404 Ill. App. Ct. 1st Dist. Nov, 30, 1917; American Lumber Co. v. Leach, 22152 Ill. App. Ct. 1st Dist. June 27, 1917. A ruling of a court striking a pleading from the files cannot be reviewed in this court unless the pleading and the showing and the ruling are preserved in a bill of exceptions. The pleading which has been stricken from the files is no longer a part of the common law record and can only be brought to the attention of the court of review by a bill of exceptions. Wittam & Co. v. Goeke, 200 Ill. App. 108, 110. When the court struck the amended affidavit of merits from the files, that document ceased to be a part of the record of the case, and, if the question of striking the affidavit from the files was to be made the subject of an appeal, it was essential that the bill of exceptions include a copy of the affidavit which was stricken. Section 38 of the Municipal Court Act provides that no formal exception need be taken in actions of the first class to any erroneous ruling of the court against the objection of the party complaining, but this does not relieve the complaining party from the duty of preserving by a bill of exceptions such matters for review as are not properly a part of the common law record. It follows, therefore, from the law as it exists in this state, that unless the bill of exceptions includes the affidavit of merits or other pleading involved, this court cannot review the judgment of the trial court in striking the

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pleading from the files.

But, even if this affidavit of merits was properly before this court, the question of the correctness of the ruling of the court in allowing the motion to strike it from the files would not be before us because the defendant waived his point as to the sufficiency of the affidavit and the correctness of the court's ruling by subsequently asking leave to file a further amended affidavit of merits. McKichen v. Follett, 87 Ill. 103; Stover Mfg. Co. v. Millne, 89 Ill. App. 532, 537; E. A. Veny v. Weiller, 90 Ill. 158.

Defendant also urges as error the ruling of the court in striking his amended statement of set-off from the files. The amended statement of set-off which was stricken from the files is also absent from the bill of exceptions. Therefore, what has already been said with reference to the affidavit of merits applies as to this assignment of error. The defendant also waived his point as to this ruling of the court by asking leave to file a further amended statement of set-off.

Both the affidavit of merits and statement of set-off are included in the common law record filed in this case, improperly so, as we have pointed out, and the arguments of counsel as presented in their briefs are addressed to the merits of the affidavit of claim and statement of set-off. It might be well for us to say, therefore, that if these pleadings had been properly preserved in ^{the} bill of exceptions, and if the question of the correctness of the ruling of the court in allowing the motion to strike them

from the files had not been waived, we would be compelled to come to the same conclusion as is indicated here. The amended affidavit in question was clearly insufficient. It is not enough for such an affidavit to state that defendant verily believes that he has a good defense to the suit, but, under the statute, he must specify the nature of the defense. Pettit v. Hall, 80 Ill. App. 376; Illinois Annotated Statutes, Sec. 3592. In attempting to specify the nature of the defense in this case, the affidavit stated that the defendant did not owe the plaintiffs the amount claimed and that there was due from the plaintiffs to the defendant a sum stated in the affidavit which amount should be deducted from any amount alleged to be due the plaintiffs from the defendant, the defendant having paid the plaintiffs the difference between the amount alleged to be due from the defendant and the amount the defendant stated in the affidavit was due from the plaintiffs to him. This was not a sufficiently clear statement of the nature of the defense.

The statement of set-off was clearly insufficient. The amended statement of claim declared upon an account stated, and set forth what purported to be a final settlement between the plaintiffs and the defendant, including any claims which either party might have on their contract covering the coal shipped for the year ending April 1, 1916. The statement of set-off sets up a claim for damages for the failure of the plaintiffs to deliver certain coal but it fails to state the date of the alleged agreement to deliver the coal or the date of the alleged breach of that agreement. For all that appeared in the statement of set-off, the transactions involved in it may have ante-

dated the alleged settlement agreement of the parties set forth in the statement of claim.

Defendant further assigns as error the action of the court below in denying his motion for leave to file a further amended affidavit of merits and statement of set-off. A motion for leave to file an amended pleading is one addressed to the discretion of the court and a ruling on such a motion will not be reversed unless it clearly appears that the court abused its discretion. The defendant had already filed two affidavits of merits and statements of set-off and we cannot say that it was an abuse of discretion for the trial court to deny defendant's motion for leave to file a third affidavit and statement.

The court, having struck defendant's affidavit of merits from the files, and properly so, a judgment as upon a default without a trial before a jury, although the defendant has a jury demand on file, is proper. DuBois v. Greenbaum, 159 Ill. App. 452; Mann v. Brown, 263 Ill. 394.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

JOSEPH A. COTTAM,
Appellee,

vs.

NATIONAL MUTUAL CHURCH INSURANCE
COMPANY, a corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT,

COCK COUNTY.

209 I.A. 404

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is a suit in assumpsit, brought by appellee, hereinafter referred to as the plaintiff, against the appellant, hereinafter referred to as the defendant, to recover upon an alleged contract of fire insurance for a loss sustained by reason of the destruction of the property alleged to have been covered by the policy. To the declaration filed by the plaintiff the defendant entered a plea of the general issue, and, while the record does not disclose it, counsel for defendant and also counsel for plaintiff stated on the occasion of the oral argument that previous to the trial of the case counsel for the defendant advised counsel for the plaintiff, by a proper notice, that upon the trial he would interpose two special defenses; first, to the effect that the property alleged to have been destroyed, which was covered by the policy of insurance in question, was set on fire by the plaintiff himself for the purpose of collecting the insurance upon it; and, second, that he had grossly exaggerated his statements to the defendant company, both as to the amount of property destroyed and as to its value. The trial in the court below resulted in a verdict and judgment for the plaintiff in the sum of

\$3400.00, being for the full amount of the policy, plus \$400.00 interest, and it is on appeal from that judgment the defendant brings the case to this court.

So far as it may be necessary to state them for the purposes of this opinion, the facts in this case, as disclosed by the evidence, were as follows:

The plaintiff, Joseph A. Cattam, was a Methodist minister. He came to this country from England with his wife in 1909 and was located at Trout Lake, Michigan, for about a year at a salary of about \$1000.00. He then removed to Newberry, Michigan, where he remained for about two years at a salary of \$1100.00 the first year and \$1200.00 the second year. Sometime in 1912 he removed to the village of Dearborn, Michigan, becoming the pastor of the Methodist Church in that village at a salary of \$1000.00 a year. While at Dearborn he occupied the parsonage which was a brick building of about nine rooms located next door to the church and 25 or 30 feet distant from that building.

On October 11, 1912, the defendant, pursuant to an application made by the plaintiff, issued a policy of insurance on the household effects and books of the plaintiff located in the parsonage at Dearborn. The policy was for \$3000.00 and ran for five years.

On the evening of January 25, 1914, which was Sunday, a fire occurred in the parsonage, resulting in a total loss. This fire occurred during the hour of the evening service of the church and at a time when the plaintiff and his wife were both in attendance at the service, and at the time of the actual breaking out of the fire

no person was in the parsonage, so far as known.

The defendant, in seeking to have the judgment of the trial court reversed, assigns a number of errors and among them certain rulings of the court with reference to the admission of evidence. The first ruling of this sort, of which the defendant complains, to which we will refer, is one which occurred during the direct examination of Mrs. Cottam. While testifying as to the various articles that made up the list of household goods that was alleged to have been destroyed in the fire, she referred to the books in the library, estimating the number of them at about 1300 or 1400 altogether. Over the objection of the defendant, after she had stated that she did not know what the books were worth, she was permitted to testify that she thought they were worth \$2000.00. In ruling upon the objection, the court below said he thought she might "state her opinion."

We are of the opinion that this ruling was error.

Lycoming Insurance Company v. Jackson, 83 Ill. 302; Gilbert v. Gallup, 76 Ill. App. 526. In the latter case, the court says, on page 528:

"When the witness said that it was impossible for him to state what such market value was, he, in our opinion disqualifies himself. We are unable to perceive how the jury could be enlightened as to the market value of the property by the opinion of the witness who not only failed to say that he believed he knew such value, but stated in substance that he did not know it."

In the case of Cooper v. Randall, 59 Ill. 317, at 320, the court says:

"When a party has stated his knowledge of the value of the class of property to which he is testifying he may usually be asked his opinion, but not otherwise."

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The defendant also complains of the ruling of the court in sustaining the plaintiff's objection to the original application for insurance, executed by the plaintiff under date of November 1, 1910 for a policy of insurance which was issued to him at that time by the defendant company, this being a policy other than the one involved in this case, in which application the plaintiff had given the value of his household goods and library at \$1700.00.

In the application which was made by the plaintiff for the later policy, which was involved in this case and which was executed October 15, 1912, plaintiff valued his household goods and library at \$4700.00 and the first list of goods destroyed in this fire including the values claimed by plaintiff, which was submitted by him to the representative of the insurance company, showed that he valued these articles at upwards of \$6000.00, and the proof of loss which was introduced in evidence showed that he claimed a loss of \$3972.00. Defendant contends he should have been permitted to show that in 1910 the plaintiff applying for insurance on his household goods and library, valued them at \$1700.00. That this evidence was material there seems to be no doubt. Having established that fact, defendant would then be in position to proceed to show that, if any, increases had been made to plaintiff's household goods or library after that date and, in this way, it might have been possible to throw some light on the question of what was the extent of his household goods and library on the date of the fire in question and what the value of that property was at that time.

It was a material link in the chain of evidence

offered by the defendant in substantiation of ~~the case~~
on its theory of the case, and should have been admitted,
and its exclusion was error.

Another ruling of the trial court which the defendant assigns as error, occurred in connection with the testimony of Mrs. Cottam at the time she was on the stand as the plaintiff's witness in rebuttal. Evidence had crept into the record during the trial of the case to the effect that this fire had been the subject of another trial which involved the charge of arson against the plaintiff. Counsel for plaintiff asked Mrs. Cottam what the result of that trial was, and, over objection by defendant, she was allowed to state: "Dr. Cottam was acquitted, surely." This was error. Mrs. Cottam, wife of the plaintiff, under our statutes, was a competent witness on only certain subjects and this was not one of them. But, it was not proper to show this by any witness and was prejudicial to defendant's case. 19 Cyc. 952.

Every particle of testimony that had gotten into the record on the subject of the prosecution for arson had been injected by plaintiff himself. First in connection with the cross-examination in the deposition of Edward T. Johnson and again in connection with the cross-examination in the deposition of Frederick C. Remer and again in connection with the cross-examination in the deposition of John H. Nollar, and again in connection with the cross-examination in the deposition of Lawrence Edmunds. In all of these instances the witnesses were being cross-examined by Mr. Kilpatrick, a lawyer representing the plaintiff in the taking of the depositions, and in each instance he asked the

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witness whether they did not testify in the Wayne Circuit Court when Mr. Cottam was tried there on the charge of arson on October 13, 1914. And again in the cross-examination of Dr. Hart, the secretary and adjuster of the defendant company, Mr. Bradley, counsel for plaintiff, asked, "Were you present in Detroit, Michigan, when Dr. Cottam was tried for arson?" Over plaintiff's objection, the witness was permitted to answer, "I was there one day, I believe."

Q. "Were you there at the conclusion of the trial?" A. "No sir."

Q. "You were not in court when the jury brought in their verdict of acquittal?" A. "No sir."

Then followed the testimony of Mrs. Cottam as a witness for the plaintiff in rebuttal, to which allusion has been made. The defendant had in no way intimated by its testimony offered in putting ⁱⁿ its case against the plaintiff that the plaintiff had been indicted and tried for arson as the result of this fire which was involved in this trial. Defendant did contend in resisting the suit brought by plaintiff on the insurance policy that this fire was an incendiary fire and that it had been set by the plaintiff himself, who they contend had destroyed his property for the purpose of collecting the insurance under this policy, but, as stated above, the defendant had included nothing in this case about the arson trial. The effect of plaintiff injecting into this trial the fact that he had been indicted for arson and acquitted was to give the jury the impression that this main defense that the defendant was making to a recovery on this insurance policy had already been the subject of a trial involving the plaintiff, in which trial it had been judicially determined that he had not set this fire. This was, of course, improper. The question of whether or not there



had been any criminal prosecution growing out of this fire was wholly immaterial to the issues of this case and the fact that the trial resulted in an acquittal was likewise immaterial and greatly to the prejudice of the defendant in this case. The error in admitting this testimony was not cured by the instruction which was later given to the jury. Lycoming Fire Insurance Co. v. Rubin, 79 Ill. 402.

Defendant assigns as error certain other rulings of the court below, a number of which sustain objections of the plaintiff to the testimony of witnesses to the effect that they talked with the plaintiff sometime after the fire and that the plaintiff told them that the Catholics had burned him out; that they were angry because he was going to preach that night on Protestantism and did this for spite, or something to that effect. Defendant's theory on this point is that the plaintiff had prepared an alibi for himself in advance and to cover up his burning of his home he had deliberately chosen the topic of Protestantism so as to be in a position to blame this fire on the Catholics, and they offered to show that he did state that he believed the Catholics had started this fire.

We are of the opinion that this evidence was material; it was some evidence bearing upon defendant's contention as to the questions at issue. The question of its value was for the jury to pass upon.

Defendant further objects to the ruling of the court in refusing to permit the reading of the deposition of the witness Cassell to the jury.

One of the articles destroyed in the fire was a player-piano, in purchasing which it was shown the plaintiff had turned in and received credit of \$300.00 on an old piano. The deposition in question sought to establish that plaintiff had bought this old piano for \$175.00; that it had been subsequently damaged and repaired at a cost of \$124.50. We think this was immaterial. It might all have been true and yet it might well have been that the plaintiff did receive a credit of \$300.00 in purchasing the player-piano. The deposition was bad for the additional reason that it directly involved another fire. And, in this connection, defendant complains further that he was not permitted by the court to enter fully into the details of a previous fire that the plaintiff had while living at Newberry, Michigan. No testimony involving that previous fire was competent, for in the trial of such a case as this, proof of other fires is not proper. Colonial Mutual Fire Insurance Company v. Ellinger, 112 Ill. App. 302; Farris v. The People, 129 Ill. 528.

Defendant further contends that the entire policy became void because plaintiff misrepresented, in writing, material facts and circumstances and made fraudulent and false statements touching the insurance, both before and after the loss. Plaintiff proceeds on the theory that all statements made by the plaintiff in his application for insurance were made part of the insurance contract and were to be treated as warranties. The application signed by plaintiff requests the National Mutual Fire Insurance Company of Chicago to furnish a policy of insurance against loss or damage by fire, and there then follows certain blank lines, one of which has been filled out thus: "Insure \$3000.00

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on household goods including library and personal effects. Valued at \$4700.00". Below that line in the application are a lot of questions and answers numbered from 1 to 24 inclusive and then there follows this language: "and the said applicant agrees that each of the foregoing questions is correctly answered and that such statements, answers and valuations are true and a warranty on his part * * *". The policy itself contains this clause: "This entire policy shall be void if the insured has concealed or misrepresented in writing or otherwise any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not truly stated herein or in case of any fraud or false swearing touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

This language is, to say the least, not clear, and when construed strictly against the defendant, whose language it is, must be held to be ambiguous. The insured applies for a certain amount of insurance on the property stated, "valued at" so much. It might well be considered that this was a statement of the amount at which the applicant valued the property, which is a mere matter of his personal opinion as to what the property was worth to him, and, in that case, such statement, if incorrect, could not avoid the insurance contract unless it had been made with knowledge of its falsity and with fraudulent intent. At no place in the application, is the applicant asked what the fair cash value of his property is. While it is true that at the bottom of the application there are words to the effect that the

valuation stated in the application is to be taken as a warranty, the policy itself in expressing the contract of the company on this point refers to misrepresentations, and we think that, in view of all the language employed by the company here, that the valuation placed by the plaintiff on his property in this application must be taken as a representation on his part. Merchants & Mechanics Insurance Co. v. Schroeder, 18 Ill. App. 216; Continental Life Ins. Co. v. Rogers, 119 Ill. 474; Globe Life Ins. Assn. v. Wagner, 188 Ill. 133; Court of Honor v. Clark, 125 Ill. App. 490. Whether or not he misrepresented the facts in making the representations which plaintiff did make in his application and also whether or not the other statements which he made on this subject in connection with his proof of loss and in connection with his testimony in the trial of the case were true or false, were all questions for the jury to determine as matters of fact involved in the case and in order to find with the defendant on this point it would be necessary for them to believe from the evidence that the plaintiff had made a material misrepresentation, wilfully and with knowledge that it was false. Manufacturers & Merchants Mutual Insurance Company v. Zeitinger, 168 Ill. 286; Beyer v. St. Paul Fire & Marine Ins. Co., 112 Wis. 138 at 142; Medley v. German Alliance Ins. Co. 55 Va. 342 at 368, in which case the language involved was very similar to the language in the application and policy in the case at bar.

Defendant further complains of the action of the court below in giving all the instructions that were given for the plaintiff and in refusing defendant's instructions numbers 13 and 14.

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We are of the opinion that the instructions given by the court for the plaintiff correctly stated the law so far as those instructions went and that there was no error in refusing defendant's instructions 13 and 14. Instruction number 13 was a pure abstract proposition of law and was not connected with the case in any way. The subject-matter of instruction number 14 was fully covered by instruction number 6 given by the court for the defendant.

Defendant further contends that it was error on the part of the court below to permit the amendment of the narr after the court had ruled on the motion for a new trial by which amendment the plaintiff increased the ad damnum from \$3000.00 to \$3500.00.

In returning its verdict the jury found for the plaintiff for \$5400.00, being the full amount of the policy, and, in addition, \$400.00 interest which made the verdict exceed the ad damnum by that amount. There was no error in permitting this amendment at any time before the entering of judgment. Ill. Statutes Chap. 7, Sec. 1, Toulinson v. Emanuel Bargshaw, 112 Ill. 311, at 313. A case cited by defendant on this point, Jones & Laughlin Co. v. Graham, 273 Ill. 377, is not in point. There the applicant was trying to avail itself of the fact that the verdict and judgment below were for a sum in excess of the ad damnum, and the court merely held in that case that this point could not be raised for the first time in the Appellate Court. No question of amendment was raised in that case.

The defendant contends further that the verdict is against the weight of the evidence and in his brief he argues that the preponderance of evidence submitted to the jury

showed that the plaintiff had set fire to his property, thus committing arson.

In view of the fact that this case will have to be tried again, we do not feel that we should discuss the evidence beyond pointing out the fact that in order to entitle the defendant to a verdict on this ground, it would be necessary to establish its case, not by a greater weight of the evidence, but beyond a reasonable doubt. This is the clearly established rule in this State, 17 Cyc. pp. 757-759. McConnell v. The Delaware Mutual Safety Ins. Co., 18 Ill. 228 at 233; Germania Fire Insurance Co., v. Klewer, 129 Ill. 599 at 612; People, ex rel v. Sullivan, 218 Ill. 419; Colonial Mutual Fire Insurance Company v. Ellinger, 112 Ill. App. 302 at 305; Solomon v. Buechele, 119 Ill. App. 595; Crane v. Shaeffer, 140 Ill. App. 647 at 658.

In examining the record in this case we have observed that in the trial of the case there was associated with counsel for the defendant a lawyer practicing at the bar in Wayne County, State of Michigan, in which the Village of Dearborn is located, and that this gentleman was counsel for Mr. Cottam, the plaintiff here, when the latter was being prosecuted in the criminal branch of the Wayne County courts on the charge of arson. Where the confidential relationship of attorney and client has existed and counsel has defended his client in a criminal trial, it is improper for him, thereafter, to associate himself as one of counsel for a client who is contesting an issue with his former client, which issue grows out of the same transaction that was involved in the criminal trial and especially where

it involves practically the establishing of the truth of the very charge against which he was formerly defending his client. People v. Gerold, 265 Ill. 448, pp. 476 to 480.

For the errors indicated, the judgment of the Circuit Court is reversed and the cause remanded.

REVERSED AND REMANDED.

MR. PRESIDING JUSTICE TAYLOR DISSENTS.

ERNEST DE ST. AUBIN,

Appellant,

vs.

WILLIAM G. KING, Individually
and as trustee, MORRIS KURTZON,
and CHICAGO TITLE AND TRUST CO.,
trustee.

MORRIS KURTZON,

Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

209 I.A. 419

MR. JUSTICE THOMSON delivered the opinion of
the court.

This is an appeal by Ernest De St. Aubin,
appellant, hereinafter referred to as the complainant,
from a decree entered against him awarding damages amount-
ing to \$471.90, to Morris Kurtzon, appellee, hereinafter
referred to as the defendant. The decree was entered
following the granting of a motion made by the defendants
to dissolve a preliminary injunction which had been pro-
cured by the complainant and is based upon suggestions of
damages which were filed by defendant.

Prior to the institution of this suit, a bill
had been filed in the Superior Court of Cook County by
The Chicago Title & Trust Co. as trustee, seeking fore-
closure under a trust deed covering the Maimonides Kosher
Hospital which had been executed to secure a bond issue
of \$40,000. A final decree of foreclosure was entered
in that case and the sale by the Master in Chancery,
under that decree, was set for Nov. 16th. The foreclosure

decree found that one W. G. King was the owner of a majority of the bonds secured by the trust deed. On Nov, 15th, defendant Morris Kurtzon borrowed \$35,000 from three different banks and purchased of King and several other of the bond holders their interests in the foreclosure decree, taking assignments thereof. The complainant here filed his bill on the morning of Nov. 16th, charging that he had concluded an agreement with W. G. King for the purchase of the Hospital bonds held by King, and that he, the complainant, was the real and equitable owner of these bonds rather than the defendant. The bill alleges that the foreclosure sale had been set for Nov. 16th and "that it will be necessary, in order to fully protect your orator, for an injunction to be issued forthwith * * * restraining said defendants * * * from proceeding with said sale * * *." The bill prays for the issuance of a writ of injunction directed to William G. King, individually and as trustee, and to Morris Kurtzon, the defendant, and the Chicago Title & Trust Co., as trustee, their agents and attorneys "restraining and enjoining them and each of them from assigning, transferring, or otherwise disposing of their interests in the First Mortgage Bonds of the said Maimonides Kosher Hospital of Chicago, as aforesaid, from entering into any agreement or arrangement for purchasing at said foreclosure sale, the said property, or from themselves buying in at said foreclosure sale, or from entering into any arrangement with any person or persons for buying for them at said foreclosure sale the said property to be foreclosed under said foreclosure sale, or from entering into any arrangement of any kind, nature or description with any other bond holder or their agents or attorneys to purchase

at such foreclosure sale the said Maimonides Kosher Hospital of Chicago, and from doing any act or deed, or anything in reference to the foreclosure sale and the disposal of their interests in said decree in reference to the Maimonides Kosher Hospital of Chicago, until the further order of this court * * *." The temporary restraining order which was entered upon the filing of the bill was served upon the parties named in the bill, and, as a result, the master abandoned the sale. The defendants' motion to dissolve the restraining order was subsequently heard, the motion was granted, and the restraining order was dissolved and the bill dismissed for want of equity. Whereupon the defendant asked leave to file suggestions of damages which was allowed. These suggestions were filed and after the hearing the court allowed as damages the sum of \$471.90, being interest in the sum of \$200.00 on money borrowed by the defendant to be used in purchasing the interest of the first mortgagees from Nov. 16th, the date which had been set for the sale under the foreclosure decree, to the earliest date at which another sale could be had, which was six weeks after that date; \$21.90 being the cost of advertising the sale which was abandoned and \$250.00 for solicitor's fees incurred by defendant for services performed by his solicitor in connection with the dissolution of the injunction. The court then entered a decree against the complainant for that amount, from which this appeal was taken.

In seeking to reverse the decree, the complainant contends that the court erred in allowing the defendant, as an element of his damages, the item of interest on the amount which he had borrowed at the banks for the purpose of acquiring the bonds of King and the latter's interest in the



foreclosure decree, for the reason that the foreclosure decree itself carried with it, interest at the legal rate during all the period for which the court allowed the defendant interest on the amount he had borrowed and also because, if the defendant was damaged at all by reason of the fact that the injunction prevented him from using the bonds he had purchased with the money borrowed, such damage was remote and speculative and therefore not recoverable. The fact that the foreclosure decree carried with it, under the law, interest on the amount involved at the legal rate would not prevent recovery by the defendant of his damages. The interest borne by the decree is an item afforded the holder of the decree by the law and was not affected one way or the other by the injunction. The defendant was directly damaged by the restraining order and the resulting abandonment of the sale and its postponement for six weeks in that he borrowed the money to use in acquiring his interest in the decree six weeks before he needed to use it. By reason of the restraining order he was obliged to pay six weeks interest on the money borrowed, to no purpose. It is true he did use the money in buying an interest in the decree and the latter carried interest under the law. But he would have been entitled to this item of damages even if he had been the original holder of the bonds. The postponement of the sale a period of six weeks postponed the use he had for his money which was thereby tied up and he should therefore have the value of it for that length of time. It seems to us that the allowance of interest on the money borrowed by the defendant for the period of delay in the sale caused by the restraining order was correct, and cannot be said to have been speculative or remote. In the case of an

injunction against the sale of property under a deed of trust or mortgage, damages should be computed according to the degree of injury actually sustained, and, in all such cases, the court may take into consideration the proper amount that might have been realized had the sale not been enjoined, the value of money at the time, and such other circumstances as tend to show the actual damages sustained. 2 High, on Injunctions, 4th ed. Sec. 1671; City of St. Louis v. Alexander, 23 Mo. 483, 522; Aldrich v. Reynolds, 1 Barbour's Chan. R. 613. In the latter case the defendant held a bond and mortgage upon a farm in the possession of the complainant and advertised the premises for sale under the statute, which sale was to have taken place on the 5th of June. Previous to that time, the complainant obtained an injunction staying the sale and gave the usual bond. The sale was stayed by the injunction until the 28th of August and finally took place on the 13th of September. As one of the items of damages, the court allowed interest on the amount due on the bond and mortgage from the 5th of June to the 28th of August, and the extra expense of continuing the notice of sale during the time the sale was suspended by the injunction.

The defendant urges that the court erred in allowing solicitor's fees because the amount allowed was excessive and further because the record fails to show that the defendant either paid or became liable to pay the amount allowed, and further, because the record does not disclose that the amount allowed was the usual, customary and fair charge for the services rendered. In support of this position, the defendant cites the case of Jevne v. Osgood, 57 Ill. 340.

This was a peculiar case in that the trial court allowed defendant, as an element of his damages, an attorney's fee of \$250 and the evidence discloses the fact that the defendant was a lawyer and attended to his own case. The court says that the law does not intend that an attorney may claim of the opposite party a fee for attending to his own suit, which is undoubtedly true. Of course in that case the defendant had not paid any attorney's fees, nor had he become liable to pay any. He had introduced some evidence to the effect that \$250 was a reasonable fee for the services rendered. The court says that such proof is not proper and sufficient upon which to base the decree, but it should be "What has the defendant paid or become liable to pay, and is it the usual and customary fee paid for such services?" Following this case, there have been several decisions holding in effect that in order to recover solicitor's fees as an item of damages in a situation like this, it was not sufficient to show that the sum allowed was a reasonable fee but that it was necessary to show that the amount allowed was a usual and customary fee, and that the defendant had either paid the amount or that his attorney had charged him with it. We believe this is not a correct rule. There is no such thing as a usual or customary fee for legal services rendered in connection with a motion to dissolve a temporary injunction. Each case rests upon its own facts, the propriety of the fee charged depending upon the amount of preparation necessary in the given case, the amount of time spent in court, in the actual attending upon the hearing of the motion, the importance of the litigation, the amount involved, and also, in some measure, upon the standing of counsel and the financial ability of the defendant to pay. What might well be considered a very reasonable fee in one

case might in another case be considered inadequate, or in still another case exorbitant. The question involved always is whether or not, in view of all the circumstances of the case, the amount allowed for solicitor's fees is reasonable and fair. In order that an amount may properly be allowed for solicitor's fees, it is not necessary to show that the defendant has actually paid the amount, nor that the lawyer who represented him has actually charged him with it upon his books. If the record discloses the fact that the lawyer has appeared for the defendant and has argued the motion to dissolve the injunction in his behalf and that the motion was allowed and the injunction dissolved, we have facts which are prima facie proof that the lawyer was employed by the defendant, and, it will be presumed that he was properly employed until the contrary is shown. Howard v. Burke, 248 Ill. 224, 231; School Directors v. Trustees of Schools, 66 Ill. 247; National Bank v. Freeman, 87 Ill. App. 622. However, the record discloses the fact that one witness testified that for the services rendered "between \$250 and \$300 would be a reasonable and fair and usual charge." Another witness testified that \$300 would be "a reasonable, usual and customary charge for services of that kind." The amount allowed for solicitor's fees in this case was entirely reasonable.

The only other item of damages allowed by the trial court was the cost of advertising the sale which was enjoined. The action of the trial court in this regard was proper. Cummings v. Burleson, 78 Ill. 281. The complainant has urged upon us the contention that his bill and the restraining order which was issued by the court pursuant to the prayer of the bill did not restrain the sale. An examination of

the language of the bill, as quoted above, discloses, however, that it substantially prayed for an order restraining this sale. The order entered by the court was that an injunction be issued as prayed for in the complainant's bill of complaint, and it inevitably followed from the entering of that order that the holding of the sale was stayed and necessarily it was abandoned.

There being no error in the record, the decree is affirmed.

AFFIRMED.

JOHN H. LLOYD,

Appellee,

vs.

LINCOLN STARS, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

20914 121

MR. JUSTICE THOMSON delivered the opinion of the court.

This was an attachment suit brought in the Municipal Court by John H. Lloyd, appellee, hereinafter referred to as the plaintiff, against the Lincoln Stars, a corporation, appellant, hereinafter referred to as the defendant, whereby said plaintiff sought to recover, under an alleged contract with the defendant, for his services rendered as manager of and a player upon the baseball team known as the Lincoln Stars, plaintiff claiming that there was due him for services rendered the sum of \$234.15. The case was tried below without a jury and the court entered a finding for the plaintiff and a judgment for the full amount with costs. The appeal is from that judgment.

The statement of claim filed by the plaintiff alleges a written contract for the services in question, executed by the plaintiff and one Roderick McMahon, and further alleges that subsequent to the execution of this contract, there was a verbal agreement between the plaintiff and McMahon by which plaintiff was assigned to play baseball during the contract period for the Lincoln Stars

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Baseball & Athletic Association and that this action by McMahon was as the duly authorized agent of the Lincoln Stars Corporation. It is further alleged in the statement of claim that plaintiff played baseball for the Lincoln Stars and was paid by them for the services so rendered at the rate called for in the contract, except for a portion of the month of August, 1915, for which he was not paid and for which he alleges there was due and owing to him the sum of \$234.15 from the Lincoln Stars.

In seeking to have the judgment reversed, the defendant contends that the court below erred in admitting in evidence the written contract signed by the plaintiff and McMahon without first establishing the fact that McMahon was the duly authorized agent of the defendant corporation, or that the latter assumed the contract and agreed to be bound by its terms. That the defendant was a corporation was not denied. An examination of the evidence, as set forth in the record, leads one to the inevitable conclusion that the Lincoln Stars Baseball and Athletic Association or the Lincoln Stars, both of which terms appear as the name of the corporation, and McMahon are one and the same thing. One witness who testified that he had done business with the Lincoln Stars for some ten or eleven years testified "Our business arrangements were with McMahon. We never heard of any other owner of the Lincoln Stars except McMahon. He transacted all the business and did all the paying." The plaintiff testified that he came to play for the Lincoln Stars through McMahon, that the latter and nobody else paid him and directed him, and that he never had any dealings with anybody representing the Lincoln Stars except McMahon, that McMahon was the owner of the Lincoln Stars and their manager, that he organized them, and that he, the plaintiff,

secured the players to make up the team known as the "Lincoln Stars" for 1915 under McMahon's direction. He further testified that McMahon attended to everything including the securing of uniforms and the baseball grounds in New York City and that when he, the plaintiff, signed up the players for 1915, McMahon supplied him with the contracts for the players to sign; these contracts being with the Lincoln Stars; that he received all orders for everything concerning the ball team from Mr. McMahon; that everything came through him; that there was no other superior officer that he knew of. All business dealings were through McMahon. Plaintiff further testifies that at the time he executed the contract in question McMahon told him he was the sole owner of the Lincoln Stars. There were also a number of letters introduced in evidence, all of which were signed by McMahon, having to do with the business of running the baseball team, showing that he had charge of everything, not only the booking of games but the making of contracts for grand stand seats, the fixing of the terms on which they were to play games in different cities and things of that nature. The only evidence introduced by the defendant consisted of two depositions, one of which was by McMahon and in answer to one of the questions in that deposition he states "I always paid him, (the plaintiff). He got no money from the Lincoln Stars besides what I paid him."

There seems to be no doubt that McMahon was the sole proprietor of the Lincoln Stars. If he was not the corporation itself, he is shown by the testimony to have been the duly authorized agent of the corporation for such purposes as are involved in the agreement of the plaintiff with the corporation. The contract was partly executed;

plaintiff acted as the captain of the team and played his position throughout the season of 1915, up to about September 1st, and received the salary called for by the contract. While the written contract was not with the defendant corporation, the evidence establishes the fact that the latter ratified the contract and received the benefit of the services of the plaintiff and that they failed to pay the latter for the period alleged in the statement of claim. It is shown by the evidence that McMahon directed the plaintiff to play with the Lincoln Stars and to secure players to make up the team, and appointed him its captain and field manager. It also establishes the fact that such payments as the plaintiff did receive, as called for by the contract, were paid out of funds received by the defendant corporation from games played by the Lincoln Stars. There was no error in admitting the contract in evidence.

Defendant further urges that the court erred in sustaining the writ of attachment, the plaintiff not having proven any grounds therefor. As to this it need only be pointed out that the affidavit for attachment alleged two statutory grounds, only one of which was denied by the defendant in its traverse. The other ground alleged was thereby admitted which is sufficient to sustain the judgment for attachment. Hopkins v. Medley, 97 Ill. 402; Simmons v. Jenkins, 76 Ill. 479; Lettick v. Hannodd, 63 Ill. 335; Williams v. Boyden, 33 Ill. App. 477; Douglas v. Matson, 35 Ill. App. 538; Richardson v. Gilbert, 135 Ill. App. 363.

There being no error in the record, the judgment of the Municipal Court is affirmed.

AFFIRMED.

1. The first part of the report is devoted to a general description of the work done during the year.

2. The second part contains a detailed account of the results of the experiments carried out.

3. The third part discusses the theoretical aspects of the problem.

4. The fourth part contains conclusions and suggestions for further work.

5. The fifth part is a summary of the work done during the year.

6. The sixth part contains a list of references.

7. The seventh part is a list of the names of the persons who have assisted in the work.

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28. The twenty-eighth part contains a list of the names of the persons who have assisted in the work.

29. The twenty-ninth part contains a list of the names of the persons who have assisted in the work.

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LOZIER MOTOR COMPANY,
a Michigan corporation,

Appellee,

vs.

LUTHER V. RICE,

Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This was a replevin suit brought by appellee against appellant to recover an automobile sold to the latter by an alleged agent of the former. The suit was tried without a jury and the court's finding and judgment were for the plaintiff.

The evidence shows that appellee, a Michigan corporation, was represented by one Deane in an office in Chicago, where he undertook to exercise for appellee the duties of a sales agent. That he had some authority to act in that capacity is apparent and not disputed. While only the extent of his authority is questioned and not clearly disclosed, it is not, under the circumstances, specially important in view of the facts.

The contract was entered into July 3, 1915, and consisted of a written offer by appellant to buy two "Lozier Machines" and other property for \$6,392.80 - payment to be made in zinc concentrates, to be subsequently delivered. By its terms one of the automobiles, the one in question, was to be delivered at once and the rest of the property at the time of the delivery of the bill of lading for the concentrates.

Shortly after Deane accepted its terms and delivered the car in question he gave a copy of the contract to one Rothschild, a vice president of the company, whose testimony "that he was practically in charge of the sales department of the company at that time" was not disputed. Rothschild knew of the delivery of the automobile and explained his acceptance of the contract "without prejudice" by saying that if there was any value in the contract he wanted to accept it for the company "without prejudice" to it and subject to its confirmation. But the only evidence bearing on the question of confirmation is that given in rebuttal by appellee's secretary, who said that the contract was not accepted but gave no facts to support such conclusion. He said "when the contract was presented to us we said that we would not accept it because Mr. Deane was authorized to sell cars only for cash." While the record does not disclose either the place, time or the parties to such a conversation, yet, assuming that the contract was presented to some one having final authority to act thereon, there was no attempt to rescind the transaction until several months afterwards. The evidence may be summarized as showing a sale and delivery of the automobile to appellant by and through an agent of appellee by virtue of a written contract that appellee with full knowledge of its execution and delivery of the machine thereunder permitted to stand for months without any attempt to rescind or disavow the transaction. The formal demand for the automobile was not made until almost six months after its delivery, and the suit was not begun until ten months thereafter. While the contract was executory in some respects and appellant stands ready to perform his part of it, that feature is not important to the question here involved. From such facts it

would appear that it was plaintiff's plain duty to disaffirm the contract promptly if it intended to repudiate it and not apparently speculate upon its advantages by withholding such action. (Twin-Lick Oil Co. v. Harbury, 91 U. S. 587; Follansbe v. Kilbreth et al., 17 Ill. 522.)

It is not a case where the rights of the parties are to be viewed from the effect of the delay of one of them to assert his rights, but one, as we deem it, where the right to rescission depended upon prompt action after knowing the facts and the other party was induced to suppose the contract was recognized. (See notes in 9 L. R. A. pp. 607 and 609.)

The court's finding seems to have been based wholly on Deane's want of authority. But under the circumstances, whether Deane or Rothschild exceeded his authority or not the company must be deemed to have ratified or acquiesced in the sale and can not now question appellant's right to the possession of the automobile. Accordingly the judgment must be reversed.

REVERSED.

91 - 23047

FINDING OF FACT.

We find that appellee, the Lezier Motor Company, sold the automobile in question to appellant, Luther V. Rice, and that it did not have the right of possession thereto at the time the suit herein was commenced.

127 - 23084

GEO. E. FORD,
Appellant,

vs.

M. PIOWATY & SONS, a
corporation,
Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 426

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This suit was brought to recover \$500, the purchase price of a car load of peaches sold by appellant to appellee for delivery to C. H. Wiener & Co., Akron, Ohio.

The peaches were shipped from Kansas and received by the Wiener Company at Akron, Ohio, which diverted the car to Pittsburgh, Pa., where the peaches were sold for \$30.45, the amount for which judgment was rendered in appellant's favor.

E. H. Wiener testified that the peaches when found by him on the tracks at Akron were in a "dead ripe" condition and had to be marketed at once and that they were sent to Pittsburgh because his Company could not handle them at Akron. The evidence is meager in essential features, and several questions of law argued here are not properly raised in the record, but the judgment was apparently rendered on the theory of appellant's neglect to give notice of the shipment or arrival of the peaches and appellee's right to recoup the difference between the purchase price and what the peaches actually sold for. But if that was the correct theory then there was insufficient evidence to show either that diligence in minimizing the loss required shipping the peaches to a

more distant place where they would necessarily arrive in a worse condition, or that they were sold at the market price or to the best advantage, and for that reason the judgment must be reversed and the cause remanded.

Appellant's point that the peaches were delivered f. o. b. is inconsistent with his statement of claim, and his contention that they were unconditionally accepted by defendant rests upon very meager testimony. In this state of the record we do not undertake to pass on the question of liability or the extent thereof. The necessity of sufficient evidence for a correct determination of the issues upon their actual merits requires a new trial.

REVERSED AND REMANDED.

147 - 23108

MENDEL SACHS,
Appellee,

vs.

FRIEDMAN BROTHERS AND
LIPSKY COMPANY, a corporation,
Appellants.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

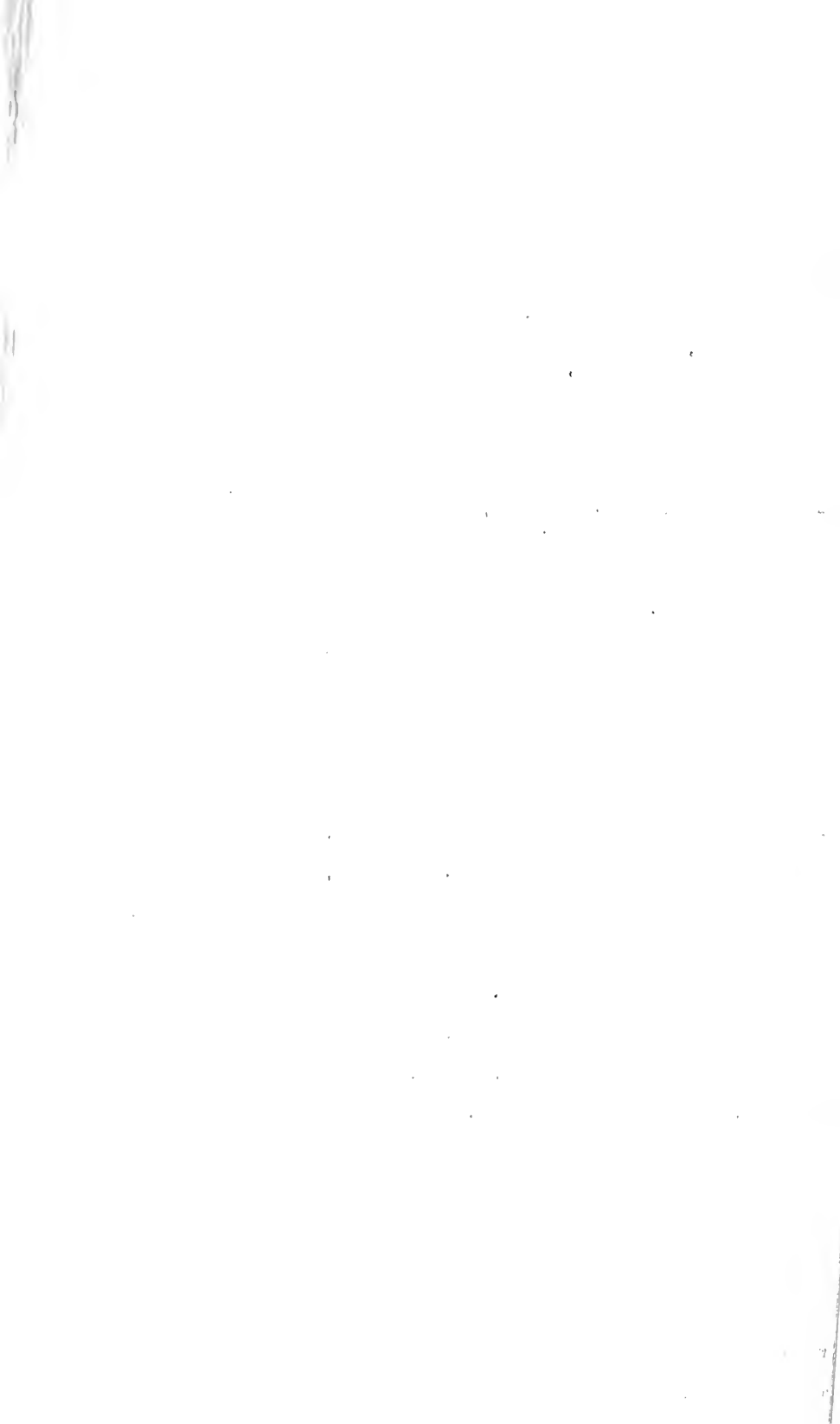
209 LA 427

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The judgment complained of was rendered on a verdict for plaintiff (appellee) in an action to recover the purchase price of goods and merchandise which plaintiff claimed he sold and delivered to defendant, and which the latter contends was sold to H. L. Friedman, the vice president of appellant corporation, and not to the company.

The evidence shows without question a sale had at an understood price of \$1218.84 and delivery of the goods at appellant's place of business, and that Friedman gave his personal checks therefor, which, not being honored by the bank, were returned unpaid.

But the only controverted fact was whether the purchase was made by Friedman for the company or for himself, and on that question, after a careful analysis of the evidence which we deem it unnecessary to review in detail, we think the jury were warranted in finding a verdict against appellant and that we would not be justified in holding that the verdict was manifestly against the weight of the evidence. In fact we think otherwise and do not regard the errors assigned and



argued as to the court's rulings on evidence sufficiently serious to have reasonably affected the real controverted question, for the evidence of defendant's liability was so conclusive, in our opinion, that the jury could hardly have reached a different conclusion.

It is urged that the jury should not have allowed interest, as it did, from the day of the sale. If any instructions were given on the subject they do not appear in the abstract. This is perhaps enough to say on that subject. But if the jury correctly found that Friedman was acting on behalf of appellant when he undertook to pay for the goods right after delivery by his checks, which were for the precise amount of plaintiff's claim, the inference follows that the amount was not questioned and was due at the time of the sale, and was, therefore, a liquidated account that bore interest under the statute. (Haight v. McVough et al., 69 Ill. 624.)

It was brought out in the evidence that plaintiff had recovered a judgment against H. L. Friedman for the amount of the claim and it is urged that plaintiff therefore elected to sue the agent instead of the principal. This was not made an issue by the pleadings and the abstract does not disclose that the court was called to rule upon the matter by instructions or otherwise. We shall not, therefore, undertake to consider the question on its merits. Finding no good grounds for reversal we must affirm the judgment.

We do not think this a case for statutory damages or additional costs.

AFFIRMED.

MYRTLE MITCHELL,

Appellee,

vs.

FRANK FARMELEE COMPANY,

Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 128

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is a suit to recover from a common carrier, engaged in the business of transporting baggage for hire from one part of the city of Chicago to another, \$1782, the estimated value of a suitcase and contents, which it received for transportation and never delivered.

The statement of claim is predicated on a breach of the carrier's contract of carriage. The final affidavit of merits admits the character of defendant's business and its receipt of the suitcase, but alleges that defendant neither knows nor admits the alleged values or what the case contained but demands strict proof thereof. Specific defenses were (1) that plaintiff assented to the condition of limitation of liability contained in the baggage check or receipt delivered to her, (2) that defendant did not promise and agree to carry certain articles alleged to be contained in the suitcase, and (3) that defendant was released from liability by reason of fraud and deceit practiced upon it by plaintiff.

If the limitation of liability in the so-called "contract-receipt" was not repugnant to the statute declaring that such a limitation in a receipt is not lawful (Hurd's R. S. Ch. 27, Sec. 1)^{yet} it is well settled law that such a clause is not binding on the shipper unless assented to.

The other specific defenses rested on evidence that when plaintiff handed the suitcase to defendant's agent for transportation she did not disclose that it contained valuable jewelry, but stated that it contained glassware and was then told that it would be taken "at the owner's risk," and that she paid fifty cents for the carriage of it.

While the evidence did not disclose that plaintiff knew or assented to the clause of limitation of liability to \$100 contained in the contract-receipt, she admitted that she had heard there was such a limitation. Assuming defendant's evidence to be true, as we must on a motion to direct a verdict, in view of such admission and evidence tending to support the inference that baggage containing articles of such value would not have been received for delivery at the carrier's risk for such disproportionate compensation, and that she stated that the suitcase contained glassware and did not mention that it contained valuable jewelry, and was informed that it would be taken at her risk, we think that the evidence presented as questions for determination by the jury (1) whether there was fraud under the circumstances in concealing the real character and value of the contents; (2) whether the suitcase contained such contents, and (3) whether there was an express understanding or agreement to take the suitcase at her risk. Hence it was error to direct a verdict.

The instruction for a verdict rested on the liability of the carrier as an insurer. But it is unquestioned law that fraud might absolve the carrier from such liability, even though not from liability resulting from negligence. But the statement of claim is not predicated on negligence, and if it was we find nothing in the proof to substantiate such a claim. On the contrary, the proof sup-

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ports the inference that the suitcase was stolen but not under circumstances tending to show negligence. The issue of fraud, therefore, was one which under the testimony adduced should have been presented to the jury.

In somewhat analogous cases where there was a suppression of the value of goods delivered for transportation it has ^{been} held in this State that the common carrier was relieved from its liability as an insurer. (Chicago & Aurora R. R. Co. v. Thompson, 19 Ill. 578; Adams Express Co. v. Perkins, 42 Ill. 458; Chicago & Alton R. R. Co. v. Shea, 66 id. 471; Oppenheimer & Co. v. U. S. Express Co., 69 id. 62.) The doctrine is also recognized and supported in Chicago Central R. R. Co. v. Carow, 73 Ill. 348; Parmelee v. Lowitz, 74 Ill. 116. We deem it unnecessary to discuss the doctrine and the basis of it, so long as there was some evidence, even though frail, to which it is applicable.

In this view of the case we need not consider objections to the evidence of values, or appellee's contention that under the rule of the Municipal Court the alleged values were admitted because not specifically denied. By hearing proof of values neither the court nor counsel for plaintiff seem to have construed the rule as applicable to the pleadings. If such proof was requisite there might be a question whether in some instances a proper foundation therefor was laid.

REVERSED AND REMANDED.

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159 - 25183

F. W. PHILPS, doing business
under the name of The Pacific
Northwest Banker,

Appellee,

vs.

LA SALLE HOTEL COMPANY, a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

2091A 130

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff's claim rests upon an alleged performance
of ^a contract with defendant for advertising, and the latter's
failure to pay for the same. The contract reads:

"\$200.00

April 27, 1915.

Pacific Northwest Banker
925 Northern Bank & Trust Building-Seattle, Wash.

You are hereby authorized to insert our
advertisement in

The Souvenir Number
American Banker's Association Convention,
Seattle, Wn.

To occupy one full page - page space for which
the undersigned agrees to pay the sum of Two
Hundred Dollars upon publication of same.

Copy for advertisement to be furnished upon
request of publishers.

Name Hotel La Salle Co.,

By Ernest J. Stevens,

V. P. and Mgr.

Address Chicago, Ill.

Accepted by

E. Feldman."

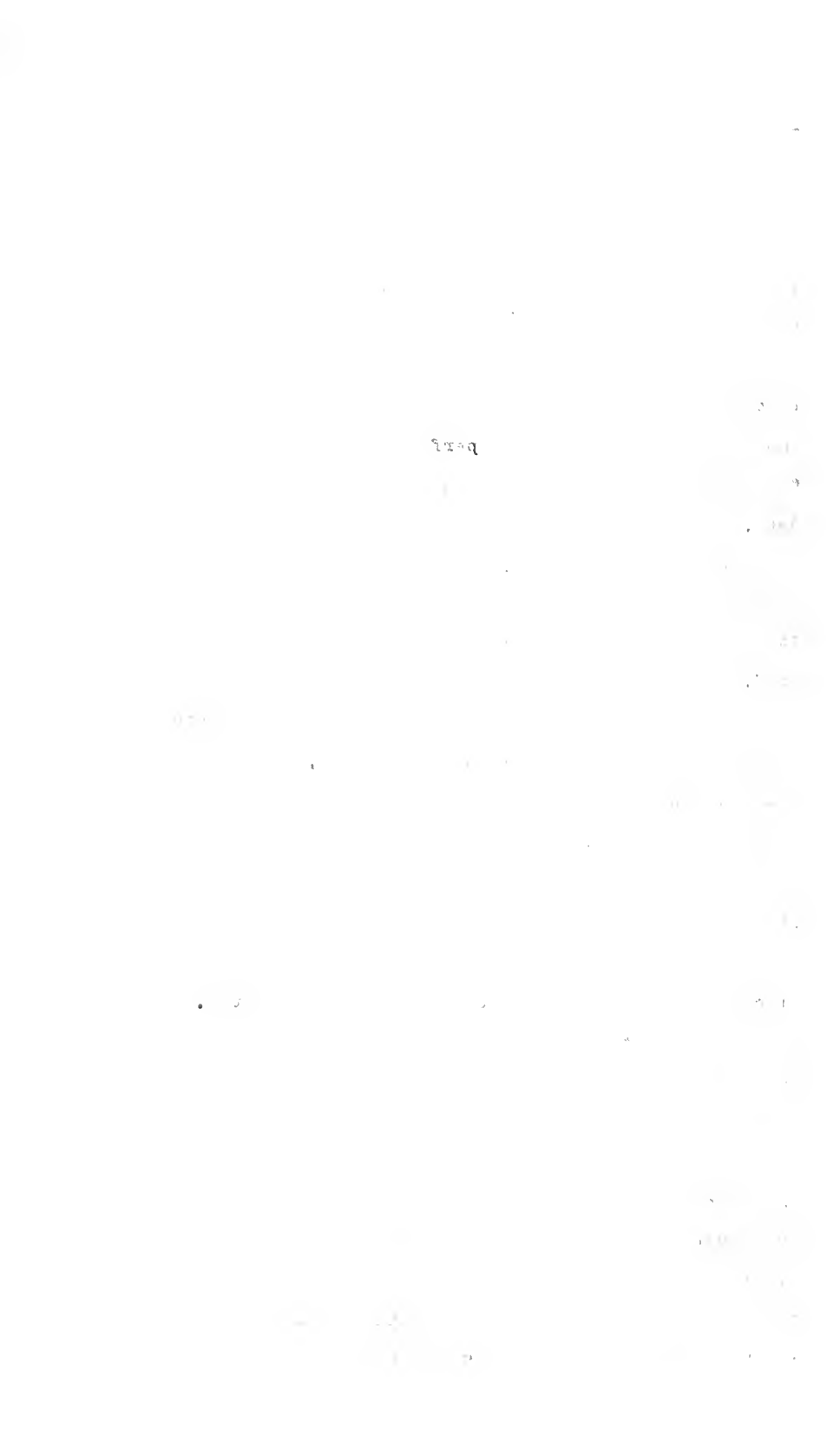
The sole defense set forth in defendant's affidavit
of merits is "That the said supposed contract * * * was on or
about June 21st, 1915, and before the performance of the said

supposed contract by the plaintiff, cancelled by the defendant."

Plaintiff proved the signatures to the contract and that Feldman was his authorized representative, and admitted that prior to performance he received defendant's letter of June 21st, 1915, cancelling the "order", and one dated July 2nd, 1915, saying the "contract referred to is cancelled." The defendant introduced no testimony and the court (a jury having been waived) denied the motion to find in its favor and found for plaintiff, assessing his damages at \$200 and costs.

It is urged that the writing was a mere order, and lacks mutuality of obligation, that the words "accepted by E. Feldman" impose no obligation. In this contention we do not concur, but regard the acceptance clause an implied promise of publication in consideration of the promise of appellant to pay for it.

The only issuable fact presented by the pleadings was whether the contract was repudiated. That not being questioned, the only thing left to decide was the amount of damages sustained. The amount assessed was the contract price. In that conclusion we think the court is sustained by the weight of authority to the effect that in an action on a contract of this kind - for advertising - it is incumbent on defendant to produce proof tending to minimize the damages, and in the absence thereof the measure of damages prima facie is the face of the contract. That rule was observed in the following



cases, some of which are analogous in form of contract and in point of fact to the case at bar. (Buyer's Index v. The X-Ray Co., 152 Ill. App. 238; Ware Brothers v. Cortland Co., 76 Atl. W. J. 331; Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702; Peck & Co. v. E. C. Metal Roofing & Corrugating Co., 96 Mo. App. Rep. 212.) The judgment will be affirmed.

AFFIRMED.

209 - 23175

FRANK A. LASLEY,
Appellee,

vs.

ANTON J. CERNAK, Bailiff of
the Municipal Court and
H. B. CRIDER,
Appellants.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209 I.A. - 31

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a trial of right of property, plaintiff (appellee) claiming as purchaser at a sale under a chattel mortgage, and defendants (appellants) under an execution on a judgment against the mortgagor. The execution was delivered to appellant bailiff, the writ served on the judgment debtor, and demand made for payment of the judgment, all on July 13, 1916, the day after the judgment was recovered. The mortgagee took possession of the property Sept. 21, 1916. The levy was made September 25th, and the notices of sale thereunder posted October 6, 1916. In the meantime this suit was begun. Plaintiff's purchase was on the same day of the levy but after the latter was made and with full knowledge of it. The chattel mortgage was executed September 29, 1915, but was not recorded until August 25, 1916.

There seems to have been no dispute about the material facts, but the court erroneously directed a verdict for the plaintiff. There can be no question that the execution became a lien on the property at the time it was delivered to the sheriff July 13, 1916. (Hanchett v. Ives, 133 Ill. 332.) And as possession under the

mortgage was taken after the lien attached and there was no evidence tending to show that the lien was suspended or had become dormant by any act of the judgment creditor or otherwise, and the chattel mortgage had not been recorded, plaintiff acquired no right as against appellants, as to whom the mortgage was invalid. (Sec. 1, Ch. 95 P. S.; Snydacker v. Blatchley, 177 Ill. 506, 513.) The judgment will, therefore, be reversed and a judgment entered here finding the right of property described in the execution in appellant Cermak as bailiff of said court.

REVERSED.

209 - 23175

FINDING OF FACT.

We find that the right to the property described in the execution in question to be in appellant Anton J. Cermak, as Bailiff of the Municipal Court of Chicago, by virtue of the lien of said execution and the levy thereof.

216 - 23182

HARRY LINDEN, Appellant,

vs.

WILLIAM DOMINICK and ADOLPH
MILLEBLUM, doing business as
William Dominick and Company,
and JOSEPH DOMINICK,
Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 1 A. 32

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This was a suit by plaintiff in error to recover the amount of money he had paid on his contract to purchase the chassis of an automobile and have other parts adjusted thereto. When he went to get the car there was a dispute as to the amount due, and defendants retained the car. During that time he was a minor. A few days later he became of age, rescinded the contract and brought suit to recover the money so paid.

The trial court said "the only question here is, can a minor make a contract and after his majority rescind the contract and recover back what he paid?" and entered the finding and judgment for defendants.

As there was no ratification of the contract shown after plaintiff reached his majority, the judgment was contrary to the law, (Muller v. Chuse Grocery Co., 241 Ill. 398) and must be reversed. A judgment will be entered here for plaintiff in error for \$97.12, being for \$90, the sum paid, and the statutory interest thereon from July 5, 1916, when the demand for the return of the money was made, and costs.

REVERSED AND JUDGMENT HERE.

me

216 - 23182

FINDING OF FACTS.

We find that the appellant, Harry Linder, was a minor when he entered into the contract in question, and that he rescinded and had not ratified it after attaining his majority, and that there is now due him \$97.12 for money he paid thereon with interest from July 5, 1916.

230 - 23196

LOUIS RUBIN, Appellee,

vs.

HERMAN H. NEWBERGER, Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

209 I.A. 433

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee brought suit to recover on two coupon or interest notes executed by appellant and secured by his trust deed of certain real estate. Appellant's successive affidavits of merits were each in turn stricken from the files with leave to amend and he electing to stand by the last, default and judgment were taken against him.

The only question presented for review is as to the sufficiency of the last of said affidavits.

It alleges after execution of the trust deed defendant sold the real estate to one Lepavsky who assumed and agreed to pay the incumbrance and placed a second mortgage thereon giving the notes secured thereby to defendant as part of the purchase price, and that subsequently by virtue of a contract between them defendant gave the latter notes to plaintiff; that with knowledge of these circumstances the holder at maturity of the notes sued on entered into some sort of an agreement with defendant to relieve him from all personal liability thereon and so notified plaintiff; that the holder subsequently threatening foreclosure, plaintiff purchased said notes from him, on which the holder had made the following

endorsement: "The lien of the within coupon or interest note is subject and subordinate to the lien of any interest and principal note maturing subsequent to the maturity of the within note"; that the plaintiff commenced foreclosure of the second mortgage and procured a sale thereunder.

Appellant's contention that the purchase by plaintiff of said coupon notes under such circumstances to avoid foreclosure was equivalent to a payment and cancellation of the same, is without merit and not supported by authority; and his claim that on the sale to Lepavsky defendant became merely a surety on the notes and that the real estate "became liable as principal for the indebtedness on said mortgage notes" is contrary to the law of this state which is that the mortgagee may treat both the mortgageor and a grantee assuming the mortgage as principal debtors and have a personal decree against both unless he has consented to accept the grantee as surety, and that his contract rights can not be changed by any arrangement between the mortgageor and his grantee without his consent. (Fish v. Glover, 154 Ill. 86; Scholten v. Barber, 217 Ill. 148, 150; Elwell v. Hicks, 180 Ill. App. 554.)

Nor was the subordination clause a defense. The right of the holder of mortgage notes to postpone the lien thereof to a subsequent lien was upheld in Jackson v. Grosser, 121 Ill. App. 363.

The affidavit alleges, but does not set forth facts to show that plaintiff was not a bona fide holder, nor does it set forth facts showing the foreclosure of the second mortgage satisfied or paid the notes sued on, or that the executory agreement to release defendant from liability thereon was supported by a consideration or in any way binding.

Nor was the conditional tender of payment a defense. In fact such a plea admitted that some money was due. (Monroe v. Chaldeck, 78 Ill. 430; Sweetland v. Tuthill, 54 id. 215.)

There is no merit in the contention of a variance by reason of such subordination clause it forming no part of the notes when executed, or by reason of the fact that a previous holder of the note, in order to indicate to him who was the owner of the equity of redemption, wrote Lepavsky's name in lead pencil underneath the signature of the maker.

The affidavit was properly stricken and the judgment will be affirmed.

AFFIRMED.

ROBERT I. WATSON, Appellee,

vs.

CHICAGO BUILDING CONSTRUCTION
COMPANY, a corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 434

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Plaintiff's statement of claim was for \$250 due for services claimed to have been rendered under an agreement to secure for defendant a certain contract for mason work. Defendant denied the indebtedness and that it entered into such an agreement.

We would be justified in striking the alleged "statement of facts" from the record and affirming the judgment for want of any assignment of error relating to the common law record. The so-called statement of facts is not a statement of facts - though called and certified as such. It is a mere recitation of testimony not certified to as either a stenographic report or a bill of exceptions.

However, were we to deem the proceedings had at the trial properly before us for review one question only would be presented, - whether the parties contemplated that the agreement should not be complete until it was actually reduced to writing and signed.

From the "statement of facts" that appears to have been a controverted fact, plaintiff testifying that the terms of the contract were agreed to and performed on

his part before the suggestion was made to put the contract in writing, and to some extent he was supported by the testimony of defendant's attorney who drew the writing that defendants refused to sign. The testimony of the defendants was to the contrary. It would subserve no purpose to repeat and discuss the evidence so long as after reviewing it we can not say that the court's finding, to the effect that there was a completed agreement before the attempt to put it in writing, is manifestly against the weight of the evidence. The judgment will be affirmed.

AFFIRMED.

JOSEPH O. KOSTNER,
Appellee,

vs.

M. R. STICE BREWERY, a cor-
poration, and WILLIAM J. DAWSON.
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

20911. 135

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

This is an appeal in a forcible detainer suit wherein a verdict was directed by the court for the plaintiff (appellee) at the close of the evidence. Appellant Brewery had a lease to the premises from September 26, 1911, until September 30, 1916, with the option until March 1, 1916, for an extension of five years, and was in possession thereof through appellant Dawson to whom it had sublet them. The lessor's interest in the Brewery's lease was assigned to appellee Kostner May 1, 1916, to whom the Brewery subsequently attorned, and he also acquired an interest in the premises for a term of years from one Pothschild who purchased them from appellant's lessor after March 1, 1916. Appellee declined to receive the rent after September 30, 1916, demanded possession of the Brewery on October 2nd, and brought this suit October 3, 1916, making Dawson defendant in February, 1917.

It is urged that no demand for possession of the premises was made on Dawson. None was necessary. (Vol. 3, Sec. 5043, and Vol. 4, Sec. 7050, Ill. Stats. Ann.) It is familiar law that after the expiration of a lease without any new agreement or assent of the lessor to a holding over, a demand for possession before bringing the

action is not necessary either of the lessee or its sub-tenant. (Condon v. Brockway, 157 Ill. 90-94; Frank v. Taubman, 31 Ill. App. 592; Geo. J. Cook Co. v. Fitzgerald, 131 id. 133-136.) Kostner had a right to treat the lessee and its sub-tenant as trespassers after the expiration of appellant's lease, (Condon v. Brockway, *supra*) and besides the lessee and its assigns were bound by an express waiver of notice and of demand contained in the lease. (Espen v. Hinchliffe, 131 Ill. 468-472; Belinsky v. Bryan, 96 Ill. 404.)

Appellant offered evidence of a conversation between Kostner and officers of the Brewery prior to March 1, 1916, to the effect that he apprised them of his having a contract to purchase the premises (which does not appear to have been consummated) and desired to know whether the Brewery intended to exercise its option of extension, and was told that it did. As there was no other proof offered of the exercise of the option, or that tended to establish a privity of contract or relation between Kostner and the Brewery prior to the latter's attornment, there was no basis for such evidence and it was properly rejected. The same conversation formed the basis of an equitable proceeding brought by the Stge Brewery against Kostner and we held that it did not estop Kostner from claiming possession of the premises after September 30, 1916, when the lease expired. (E. R. Stge Brewery v. Kostner, 203 Ill. App. 416, and opinion filed December 21, 1917.) Much less did it confer upon appellant any legal right to possession.

The objection to the admissibility of said conveyances made after March 1, 1916, whereby Rothschild took

the fee from appellant's lessor and appellee a lease from Rothschild for a term of years, was properly overruled as they supported appellee's claim to the right of possession after September 30, 1916.

As the judgment must be affirmed we deny appellee's motion to strike the bill of exceptions from the record regardless of its merits, if any.

AFFIRMED.

523 - 23868

LOUIS WEBER & COMPANY,
a corporation,

Appellee,

vs.

HOT POINT ELECTRIC HEATING
COMPANY, a corporation,
Appellant.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 137

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

Appellee has moved to affirm the judgment herein, basing his motion upon the fact that all of the assignments of error relate to the proceedings had at the trial, and the further fact that such proceedings have not been preserved in the record. Appellant has filed his brief and argument discussing only questions of evidence and the rulings of the court thereon. In the absence of any document preserving in the record the proceedings had at the trial on which such assignments of error are based it is manifest that there is nothing before us for consideration.

We find attached to the assignment of errors an affidavit of one of appellant's counsel purporting to set forth what took place at the trial. It does not appear to have been a part of the record below and hence is improperly inserted in the record here, and will be stricken on our own motion. Under the circumstances motion to affirm the judgment will be allowed.

AFFIRMED.

ORIENT MANUFACTURING COMPANY,
a corporation,

Appellee,

vs.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

C. A. CHANNELL.

Appellant.

09 - 1 - 198

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was a proceeding by scire facias, commenced by the Orient Manufacturing Company, plaintiff below, on the 21st day of July, 1916, in the Municipal Court of Chicago, against C. A. Channell, defendant below, to revive a judgment recovered by the said Orient Manufacturing Company against the said C. A. Channell, on the 23rd day of January, 1907, for the sum of \$177.25 and costs. The writ was made returnable on August 3, 1916. On August 4, defendant was defaulted for want of an appearance, and a judgment of revivor was entered in favor of plaintiff, in the sum aforementioned. On August 9, defendant filed an appearance in the said cause and with it a motion, supported by affidavit, to vacate the judgment of revivor. Upon a hearing the court on October 14, 1916 denied this motion, and thereupon defendant prayed an appeal from the said order of denial. On October 21, 1916, defendant filed a verified petition in said cause, setting forth that the judgment upon which the scire facias proceedings were based was not properly entered of record, and praying that plaintiff be required to show cause why an order should not be entered requiring the clerk of the Municipal court to enter, in a properly bound book of records, a full and complete record

of the judgment, according to the forms of the common law, which might be certified to the Appellate Court. The court denied defendant's said petition, and thereupon defendant prayed an appeal therefrom to this court. By this anomalous method, defendant has taken two separate appeals in the same cause, after the entry of final judgment.

The affidavit filed in support of defendant's said motion of August 9, 1916, set forth, substantially, that the failure of defendant to file a timely appearance in the said cause was due to an oversight on the part of counsel's stenographer, who had been directed to remind him, upon the return day of the writ, to file an appearance and an affidavit of defense. But from the said affidavit it appears also, that a clerk in counsel's office, who knew of the pendency of the said cause, had made an investigation of the court record some time prior to the return day of the writ, for the purpose of preparing an affidavit of defense. Upon this showing, it cannot be said that counsel has used due diligence and that the court abused its discretion in denying the said motion. Nor does it appear from said affidavit, that defendant had a meritorious defense to the said action. The allegation, that defendant was not jointly liable with another defendant, and that he ~~XXXX~~ was unaware ~~XXXX XXXX XXXX XXXX~~ of the fact that no judgment had been entered against the said other defendant, does not set forth a good defense. The other recitals in the affidavit, if true, would show at most an irregularity in the judgment. This, however, would not be sufficient to set aside the judgment on a scire facias proceeding. The only defense available in such a proceeding is, that the judgment was void or that it has been paid. Reed v. Waterbury Natl. Bank, 231 Ill. 246.

With respect to defendant's second motion made after

the expiration of the judgment term and after the overruling of a similar prior motion made during the term, from which an appeal was also taken, it is sufficient to say that under section 21 of the Municipal Court Act, ch. 37, S. 5. of Ill. the subsequent motion would not lie. People v. Wells, 255 Ill. 456; Flora v. Fields, 156 Ill. App. 341.

Finding no reversible error, the judgment will be affirmed.

AFFIRMED.

149 - 23110

CONGRESS HOTEL COMPANY,
a corporation,
Appellant,

vs.

ELLA E. SOUTHGATE, individually
and as executrix under the last
will and testament of Richard
H. Southgate, deceased,
Appellee.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

209 I.A. 442

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree sustaining a general demurrer to and dismissing for want of equity, a certain amended bill filed by the Congress Hotel Company, complainant below. The primary object thereof was to compel the defendant, Ella E. Southgate, individually and as executrix under the last will and testament of Richard H. Southgate, hereinafter referred to as the deceased, to refund to the complainant so much of the estate received by her from the deceased as will equal the full value of 1140 shares of the capital stock of the complainant, together with interest and dividends thereon, and to decree that certain real estate alleged to have been purchased out of the proceeds of the sale of the said 1140 shares of stock be impressed with a trust in favor of the complainant.

The salient facts recited in the amended bill of complaint are substantially as follows:

That the complainant is an Illinois corporation, authorized to carry on a hotel business and to erect and

maintain suitable buildings for that purpose in the city of Chicago; that on May 18, 1901, and prior thereto, its capital stock consisted of 12,000 shares of common stock and 5,000 shares of preferred stock, of the par value of \$100 per share, at which time the deceased was the owner of 100 shares of the said common stock, and was also a director and vice president of the complainant; that prior thereto and continuously thereafter up to March 1, 1911, the deceased was manager of the hotel property of the complainant, and for his services in that capacity he was paid a salary; that on May 17, 1902, he was elected president of the complainant and continued in such office until March 1, 1911; that during the year 1898 the complainant erected a building known as the Congress Hotel, at the corner of Michigan avenue and Congress street; that during the years 1900 and 1901 it became necessary for the complainant to enlarge its hotel and to construct an addition thereto; that with this in view, during the year 1900, the complainant obtained a 99-year lease from one Blair to the property known as No. 225 Michigan avenue, located immediately south of and adjoining the complainant's hotel building; that the deceased obtained for himself and in his own name, an option for a 99-year lease on the premises known as Nos. 226 and 227 Michigan avenue, immediately south of and adjoining the aforesaid Blair property; that the by-laws of the company then in force provided for a board of nine directors; that on May 18, 1901, five directors held a special meeting of the said board, at which the deceased and four others were present and adopted a resolution providing that a certain contract between the deceased and the complainant be approved and spread of record, and that the officers of the

complainant be authorized to execute and deliver the same; that the contract referred to provided that the deceased, having an option for a lease on the premises known as Nos. 226 and 227 Michigan avenue, should cause a 99-year lease to be executed and delivered to the complainant; that he should cause to be erected on the premises on which he had the said option, and on those already leased to the complainant, a building to be used in connection with the one occupied by the complainant; that he should contract for the construction thereof and have complete control of the erection of the said building; that for the purpose of raising money with which to pay for the proposed structure, the complainant should float a bond issue for \$800,000, securing same by trust deed on its leasehold interest in the aforesaid premises; that the deceased should solicit subscriptions to the said bond issue; that in consideration of his procuring the contemplated lease, his services in contracting for the construction of the new building and in obtaining subscriptions to the proposed bond issue, the deceased was to receive from the complainant \$231,000 of the common capital stock of the complainant, fully paid and non-assessable; that on July 31, 1901, a supplemental agreement was entered into between the complainant, the deceased and the Merchants Loan & Trust Company of Chicago, wherein the latter was made trustee to receive the said \$231,000 of stock, which it was thereby directed to turn over to the deceased as his sole property, upon the completion of the building and improvements; that on March 7, 1902, the said Merchants Loan & Trust Company turned over the \$231,000 of stock, 1140 shares of which were delivered to the deceased, and the remainder to certain others, in accordance with his orders; that during the year 1910 the deceased sold the said 1140 shares of stock, and out of the

proceeds of the sale thereof purchased certain real estate in the city of Chicago; that he died on March 3, 1912, leaving a last will and testament, which was duly proved in the Probate Court of Cook County; and that the defendant, his widow, was therein appointed executrix.

The amended bill of complaint further alleged that the acts and doings of the directors at the special meeting of May 15, 1901, at which the said resolution was adopted, were void and not binding on the complainant, because there was no quorum of the directorate present at the said meeting; that the presence of at least five members was indispensable to constitute a quorum; that there were five members present, including the deceased who, however, should not have been considered as present because he was interested in the contract to be voted upon. It further alleged that the consideration to be paid the deceased was so excessive and exorbitant as to constitute a fraud upon the complainant and its stockholders; that the said agreements were procured while the deceased sustained a fiduciary relationship to the complainant; and that the said agreements were never authorized by a legal vote of the directors at any meeting held in accordance with the by-laws, and were never ratified by its stockholders at any meeting of the said stockholders at which such reference to the said acts and dealings of the board of directors was made, which would have apprised the stockholders present at such meeting of such acts of the said board of directors. There is also an averment that from March, 1903, to March 1, 1911, the deceased, by reason of his large stock holdings, dominated the entire directorate of the complainant and controlled its policies and destinies, for which reason no action could have been taken during that time to set aside the agreements

complained of; and that the said acts of the deceased were never ratified by the directors or stockholders of the complainant since the alleged domination by the deceased terminated.

If the contracts complained of were free from fraud on the part of the deceased, then the fact that he was a director of the complainant at the time of their consummation and adoption would not impair their validity. (L. E. A. & C. Ry. Co., v. Carson et al., 151 Ill. 444, 448.) The amended bill of complaint contains a general allegation of fraud, but there is no specific averment of any fact or facts from which fraud can reasonably be inferred; the pleader's mere conclusion being insufficient. When the deceased procured the said lease option; what consideration, if any, he paid therefor; what profit, if any, the deceased derived from the entire transaction, or whersin the consideration recited in the said agreement is exorbitant, is not disclosed by the bill of complaint.

With respect to the alleged domination of the directorate of the complainant, from March, 1902 to March 1, 1911, it will be noted that the resolution approving the contract in question and authorizing the proper officers to execute the same, was passed at a meeting of the board of directors held during the month of May, 1901, and that pursuant to the said resolution, the said contract was executed on July 17 thereafter at another special meeting of the board of directors, at which apparently the entire board were present, as no question is raised as to the regularity or legality of the business transacted thereat. At this meeting a supplemental agreement was entered into which in effect was a complete ratification of the action taken at the meeting of May 18, 1901, for it authorized the Merchants Loan & Trust Company to

deliver to the deceased the stock in question upon the completion of the building. At this time the deceased was the holder of but 100 shares of capital stock of the complainant. He could not, therefore, have dominated the board of directors by reason of his stock holdings; and in the absence of any charge of fraud on the part of the directors in ratifying the said agreement, the bill of complaint fails to set forth a cause of action in this respect.

No question as to the legality of the said contract was raised from May, 1901 to March, 1902, during which time it must be conceded the deceased did not dominate the board of directors; and it is significant, that on September 5, 1911, after the alleged domination by the deceased had terminated, the complainant refused to take any action in the matter when requested in writing to do so by one of its stockholders, and no action was taken by complainant until the year 1915. Complainant cannot excuse this passivity on its part because one of its stockholders threatened to and did subsequently file a bill in the United States District Court, which was afterwards dismissed.

From a careful examination of the bill of complaint, it is evident that when the board of directors ratified the agreement complained of they were acting in good faith and were free from any domination on the part of the deceased. The agreement having been thus legally ratified by the board of directors and spread of record on the books of the complainant, which were open to inspection, clearly the said board of directors had actual notice thereof, and the stockholders at least had constructive notice. The company has availed itself of the benefits of the contract in question for upwards of 15 years, during which time it has apparently enjoyed sufficient prosperity to pay large dividends on its stock. From the foregoing, it is apparent not only that the bill of complaint is

devoid of equity but also that complainant has been guilty of laches in instituting this proceeding. Accordingly the decree will be affirmed.

AFFIRMED.

155 - 23118

HENRY P. REGER, Appellee,

vs.

RAY BRYAN, Appellant.

209 I.A. 144

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This appeal presents for review a judgment for \$110.43 entered in favor of appellee, plaintiff below.

Plaintiff owned a motor boat which was moored in Jackson Park lagoon, in the city of Chicago, during the summer of 1914. On August 29, 1914, defendant took the said boat out, and while operating it in the outer harbor, a United States government agent came aboard to take inventory of its equipment, and upon inspection certain equipment required by federal statute was found lacking, for which infraction a penalty was assessed against the said boat, which was subsequently, upon application, reduced to \$20. On February 26, 1915, the said boat was libeled and seized by the federal authorities for failure to pay the said fine. On April 5, 1915, plaintiff, through his attorney, settled the matter by paying the sum of \$150.00. Of this amount, \$121.35 was for custodian's fees which accrued after the boat had been libeled and seized.

The principal question here presented is one of fact, viz., whether the plaintiff had notice of the fine imposed upon his boat, before its libel and seizure. Plaintiff testified that he first learned of the government's

action during the latter part of February, 1915, when one Rupkee, the harbor master in charge, informed him of the libel and seizure of his boat for failure to pay the fine hereinabove referred to. The evidence shows that the libel proceeding was commenced and the boat seized on February 26, 1915. According to plaintiff's admission, therefore, he received immediate notice thereof. It further appears from the evidence, that plaintiff and defendant, together with one Burke, took a trip in plaintiff's boat subsequently to its inspection by the government agent in August, 1914. Defendant testified that on this occasion he informed plaintiff of the action of the government just referred to, and his testimony in this respect was corroborated by the said Burke. Plaintiff, while admitting that the three were out together as stated, denied having ever been so informed by defendant. The evidence also shows that on February 10, 1915, the United States collector of customs at Chicago addressed a letter to plaintiff in which he informed him of the fine levied against his boat and requested immediate payment thereof, stating further that unless the fine was promptly paid, plaintiff's boat would be libeled and seized. It having been admitted that this letter was mailed in due course from the office of the collector of customs, a copy thereof was received in evidence without objection. Plaintiff testified, however, that he did not recall having received any such letter. This latter testimony was of a purely negative character, and under all the circumstances in evidence, failed to rebut the presumption that he did receive it but was apparently indifferent in the matter. Plaintiff's apparent indifference is further evidenced by his failure to act for nearly six weeks after he had admittedly learned that his boat

had been seized by the government. From a careful examination of all the evidence, we are impelled to the conclusion that plaintiff was fully aware of the fine imposed, at a time when payment of the sum of \$20 would have discharged his boat and avoided the additional expense hereinabove referred to. His recovery should therefore have been limited to this amount.

(Cedar Rapids Ry. & Lt. Co. v. Sprague Elec. Co., 280 Ill. 386.)

Accordingly the judgment will be reversed and judgment entered here for plaintiff, in the sum of \$20. Each party to pay his own costs.

JUDGMENT REVERSED AND JUDGMENT HERE.

155 - 23118

FINDING OF FACTS.

This court finds as a fact, that prior to February 26, 1915, plaintiff knew that a fine in the sum of twenty dollars (\$20.00) had been imposed upon his motor boat for being operated on navigable waters without proper and sufficient equipment as required by the United States maritime laws.

163 - 23127

FLEMING M. WATKINS,
Appellee.

vs.

SOUTHERN RAILWAY COMPANY,
a corporation,
Appellant.

20911445
APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$3,000.00 entered against appellant, defendant below, in an action brought under the federal employers liability act.

The accident occurred on October 21, 1912, between the hours of 5:30 and 6:00 P. M., in the city of East St. Louis, Illinois. At the time of the injury, plaintiff was in one of defendant's switch yards, known as the sixth street yard. Defendant had another switch yard known as the Denverside yard, which was located about one and one-half miles east of the said sixth street yard. A frame building known as the switch shanty was located at the east end of defendant's said sixth street yard, about 1100 feet east of the place where plaintiff was injured. The switching crews employed in defendant's said yards worked in shifts, - the night crew going on duty at 5:45 P. M. At the time in question, both crews used the same switch engine. Plaintiff was the foreman of the night crew. According to his testimony, it was his custom, pursuant to an order from his superior, to report for duty about ten or fifteen minutes before the time for the night crew to commence work, and go through the said sixth street yard to observe the location of the cars to be switched. Plaintiff was injured

while about the cars in the said sixth street yard.

The declaration, which consisted of three counts, alleged that defendant was engaged in interstate commerce, and that plaintiff was employed by defendant in such commerce on the day in question; that while passing through the switch yard and observing the location of cars therein, preparatory to switching same, at which time he was in the exercise of due care for his own safety, and while near a certain car, certain other servants of the defendant, then and there employed in switching cars in said yard, negligently and carelessly propelled a certain car against the car near which the plaintiff was, with such great force and violence, that the said last mentioned car was suddenly knocked and propelled against and over the plaintiff, whereby he was injured, necessitating the amputation of one of his legs. The second count alleged negligence on the part of defendant in failing to have a switchman upon the said car so propelled. The third count charged defendant with negligence in failing to warn plaintiff of the approach of the said car.

It is the contention of the plaintiff, that he was injured through the negligence of the day crew, while he was making an observation of the cars to be switched by his crew. Plaintiff, who was the only witness on his behalf as to the manner in which the accident occurred, fixed the time of the occurrence between 5:30 and 5:45 P. M. On behalf of the defendant, two witnesses testified that the switch engine used by both crews came from the direction of the Denverside yard and stopped at the switch shanty, at 5:40 P. M., when it was turned over to the night crew. Both of these witnesses were members of the crew of which plaintiff was foreman. Their testimony, if true, - and it was not directly contradicted -

would tend to show that this switch engine was not engaged in the said sixth street yard at the time plaintiff claims to have been injured, and that hence the accident could not have occurred while the said engine was in charge of the day crew.

Plaintiff further testified that on the day of the injury he reached the west end of the sixth street switch yard, at about 5:30 P. M.; that he walked east along the south side of track 5, observing the cars thereon as he did so, until he had passed all of the cars on said track; that he then crossed over to track 7 which was located south of track 5, and walked back west eight or ten car lengths on the south side of track 7, observing the cars thereon as he did so; that he then saw an opening, through which he noticed two coal cars standing on track 6, which was located between tracks 5 and 7; that he started through to look at them; that he turned around and saw no engine; that by passing through the opening between the cars on track 7, he came to about the middle of the east car on track 6; that just as he was in the act of climbing up the side of the car to find out if it was empty, a car was "kicked" in from the east, striking the said coal car, whereby he was thrown to the ground and injured.

The evidence further shows that track 6 was straight practically its full length; that just prior to the time of the injury, according to plaintiff's testimony, it was still sufficiently light to enable him to read the cards on the cars; that when plaintiff had crossed over from track 7, he was at about the middle of the coal car that was struck; that the distance between track 7 and track 6, where plaintiff was walking, was slightly more than twelve feet. So far as this evidence shows, plaintiff's view along track 6 at

and just prior to the time of the injury must have been entirely unobstructed. Whether, just before the impact, plaintiff looked in the direction of the approaching car is not clear from his testimony. In view of the fact that plaintiff contended that he was injured by the day switching crew, his failure to testify whether or not he saw any of the said crew on duty in the yard in question while he walked the entire length thereof in making his preliminary inspection of the cars is very significant, particularly in view of the uncontradicted testimony of two of defendant's witnesses who were members of the night switching crew of which plaintiff was foreman, that they saw the said switch engine coming from the direction of the Denverside yard at or about the time plaintiff claimed to have been injured, and that it stopped at the switch shanty at the east end of the sixth street yard, where it was turned over to the night switching crew. The testimony bearing upon this important link in plaintiff's case is of too meagre and uncertain character to permit a verdict to be predicated thereon. The foregoing are only a few of the shortcomings occurring in plaintiff's testimony, but they will suffice to show the unstable foundation upon which the verdict was based; and inasmuch as it appears from the record that additional testimony may be available upon another trial we feel that the judgment should be reversed and the cause remanded.

Other questions have been presented which, in our view of the case it is unnecessary to pass upon, save to say that if errors were committed, they will not recur on another trial.

For the reasons hereinabove assigned, the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

178 - 23143

Handa
MARIE L. HANDA,
Appellee,

vs.

ANTON J. CERNAK, Bailiff
of the Municipal Court of
Chicago,
Appellant.

JUDICIAL ROOM

MUNICIPAL COURT

OF CHICAGO.

2091A 246

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment recovered by appellee, plaintiff below, against defendant, for the conversion of certain property which the latter had levied upon and sold on an execution issued against plaintiff's husband.

The property in question consisted of a player piano, a piano stool and bench, and a piano lamp pedestal, which plaintiff's husband had purchased on the installment or deferred payment plan some two years prior to the levy and sale complained of. Shortly after the said purchase, default having been made in the payments and the vendor having threatened to retake the property, plaintiff, with the consent of the vendor and of her husband, made a new arrangement with the vendor, whereby she undertook to pay for it in her own name, giving the vendor a chattel mortgage thereon for the unpaid balance of the purchase price, which was duly filed for record. This was several months before the indebtedness of plaintiff's husband forming the basis of the said levy and sale, was incurred.

It is contended by defendant, that the aforesaid transaction was invalid, and we are referred to sec. 9,

ch. 63, Hurd's R. S. of Illinois, which provides that transfers of goods and chattels between husband and wife living together, must be in writing and executed and recorded in the same manner provided for the execution of chattel mortgages, otherwise they are invalid as against the rights of third persons.

As we view the facts in the case at bar, there was no conveyance of property from husband to wife, but it was a re-sale from the vendor to the plaintiff. Furthermore, the husband's insubstancies having been incurred after the re-sale took place, his creditors' rights were not affected thereby. Moray v. Ill., 103 Ill. App. 76; Koch v. Sallis, 176 Ill. App. 366.

There is therefore no merit in defendant's position that the damages awarded are excessive. The value of the said property has been properly established by competent evidence, and the jury have had the benefit of all evidence bearing upon that question.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

225 - 22191

ABRAHAM B. COLLINS,
Appellee,

vs.

FRANK DEAL,
Appellant.

APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

209-1-17

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying a motion by appellant, defendant below, to vacate and set aside a judgment entered by confession on September 25, 1916, in the sum of \$125 and costs.

On October 19, 1916, defendant entered a motion, supported by proper affidavit, to vacate the said judgment, which the court upon hearing denied on the same day. On November 21, 1916, defendant made a similar motion, which was likewise denied by the court. From this latter order of denial defendant has prayed an appeal.

Section 21 of the Municipal Court Act, ch. 37, R.S. of Illinois, provides that every judgment final in its nature, shall be subject to be vacated, set aside or modified, upon motion made within thirty days after the entry thereof; that if no such motion is made within the time stated, the judgment shall not be vacated, set aside or modified except upon appeal or writ of error, or by bill in equity or by petition in the nature thereof. The order denying defendant's said first motion was final, and under the provisions of the said section 21, the only method of reviewing it was by appeal or writ of error; and no subsequent motion to

vacate and set aside the said judgment would lie. (People
v. Jella, 256 Ill. 450; Worn v. Fields, 156 Ill. App. 341.)
The court therefore properly denied defendant's motion of
November 21, 1916. Accordingly the judgment will be
affirmed.

AFFIRMED.

W. A. TULL,
Appellee,

vs.

F. L. CLARKE,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 118

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

By this appeal it is sought to reverse a judgment for \$1,000 in favor of appellee, plaintiff below, in a fourth class municipal court action, for personal injuries sustained.

The paramount question presented for review is, whether or not the statement of claim sets forth a cause of action.

Plaintiff's statement of claim recites that he sustained injuries on or about November 1, 1913, in an alley in the city of Chicago, by reason of the negligence of the defendant in using a skid which was defective and of insufficient strength to support a certain cask of great weight, and which broke while the said cask was being lowered thereon, injuring plaintiff while walking in said alley and while exercising due care and caution for his own safety. Under section 40 of the Municipal Court Act, it is not necessary to set forth a cause of action with the particularity required by the rules of common law pleading. The said section requires only a brief statement of the nature of the tort and such further information as will reasonably inform defendant of the nature of the case he is called upon to defend. In our opinion, the statement of claim conforms to the requirements of the said section. Enberg v. City of Chicago, 271 Ill. 404.

It is next urged by defendant that plaintiff cannot maintain this action because it appears that he was an employee of the Quaker City Rubber Company at the time of his injury, and that hence he was subject to the Workmen's Compensation Law of the State of Illinois; that by section 6 of said act, if any right of action for the injuries complained of would lie, it was vested in his employer. Assuming that the evidence showed that plaintiff came under the provisions of the said compensation act, - a question which we do not deem it necessary to decide here - it is sufficient to say that this question not having been raised in the court below, it cannot be presented for the first time in this court.

It is finally urged that the damages awarded are excessive. The evidence tends to show that plaintiff sustained a severe strain of the leg, which resulted in chronic arthritis; that his leg was badly swollen for two or three months after the injury; that he was obliged to use a crutch for some six months thereafter; that he limped and had pains in his knee, and up to the time of the trial continued to have chronic arthritis of the knee joint.

The assessment of damages in cases of this character rests in the sound discretion of the jury, under the guidance of proper instruction. (C. C. Ry. Co. v. Strong, 129 Ill. App. 511; C. C. Ry. Co. v. ^BReddick, 139 Ill. App. 160.) And while it may be conceded that it is difficult to determine them to a mathematical certainty, yet it is equally difficult to say that the verdict for \$1,000 is excessive.

There being no error in the record which justifies a reversal, the judgment will be affirmed.

AFFIRMED.

HARRY STALEY,
Defendant in Error,

vs.

TAYLOR A. SNOW, GEORGE J.
HABERER and CHARLES H. COMMONS,
doing business as the Co-Operative
Home Purchasing Society,
Plaintiffs in Error.

Error to

Municipal Court
of Chicago.

209 I.A. 152

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a writ of error to the Municipal Court of Chicago brought by Snow and Haberer, two of the defendants below to reverse a judgment in favor of the plaintiff and against the defendants Snow, Haberer and Commons, doing business as the Co-Operative/HomePurchasing Society.

Plaintiff below sued upon certain written contracts numbered 88 to 91 inclusive, upon which 50 payments of \$21.00 each had been made by the plaintiff. Similar contracts have heretofore been held valid by this court and the material parts thereof are set forth in the opinion rendered in the case of Harlow v. Snow et al., 147 Ill. App. 369.

Plaintiff's statement of claim was for money due under these contracts "because and by reason of the breach of said contracts by said parties defendant. * * * *". The affidavit of merits denied the material facts set forth in plaintiff's claim and specifically that defendants were jointly liable as co-partners. It further set up the statute of limitations.

There was a sharp conflict in the evidence on the question of joint liability. Plaintiffs in error argue

misjoinder and nonjoinder, insisting first that the evidence is wholly insufficient to show that plaintiffs in error did business jointly with Commons under the name of the society, but further that if it be held sufficient, then such evidence also proved that one J. H. Carpenter who acted as the agent of the society and whose name appeared on some of its literature as one of its managers, was also liable and should have been joined as a defendant. However, we think there was evidence tending to show (as the court must have found) that Taylor, Snow and Commons as partners did business under the name of this society and that Carpenter was not interested in the business, but on the contrary acted only in a representative capacity.

Plaintiffs in error also urge that the claim sued for was barred by the statute of limitations. They first argue that this is so because the names of the defendants did not appear in the contracts sued on. However, the mere fact that it was necessary to introduce evidence to identify the defendants as the co-partners who did business under the name of the Co-Operative Home Purchasing Society would not make the contract sued on an oral one. (Plumb v. Campbell, 129 Ill. 101; Conductors' Benefit Ass'n. v. Loomis, 142 Ill. 568.) The validity of the defense of the statute of limitations depends on whether the action is to be construed as one for breaches of written contracts in which case the limitation would be ten years "next after the cause of action accrued" as provided in section 16 of limitations statute, or one upon an oral or implied contract in which case the action would be required to be brought within five years "next after the cause of action accrued" as provided in the 15th section of that statute. The test is whether the

promises sued on were in writing or oral, and if such promises were in fact oral, it would make no difference that they arose in the first instance out of a written contract.

There are no specific promises in the contracts here sued on to return the purchase money, and if the suit is for the return of the money paid under these contracts, it must rest upon an implied promise which being oral, would require the application of the five year limitation and this would bar the suit.

Plaintiff's statement of claim declares upon the written contracts and not upon any oral promises implied therefrom. It does not purport to be for the return of the money paid under the contracts. True the breach of the written contracts relied upon by plaintiff is not clearly set forth in his statement of claim, but the defendants did not take any steps to secure a better statement and as no propositions of law were submitted to the court by either side, we are left much in the dark as to the theory upon which the court assessed damages. However, we are not able to say that they were assessed upon the theory that plaintiff was entitled to a return of the money paid under the contracts. Memory v. Niepert, 131 Ill. 634.

Moreover, we do not think the amount of damages allowed inconsistent with the theory that these damages were awarded for breaches of the promises contained in the written contracts. The evidence shows that the society refused to go on with the contracts and complete them according to the written terms thereof. In such a case the plaintiff might rescind the contracts and sue upon implied promises to repay the money, or he might regard the failure to complete the

contracts as a breach of their written terms and sue for such breaches. In such case his damages would prima facie be equivalent at least to the amount of money which he paid under the contracts. It was for the plaintiff to elect on which theory he would proceed and the pleadings (indefinite as they are) indicate that he chose the latter one. On this theory he could recover. Sachring v. Oliver, 7 Ill. App. 176.

The judgment will be affirmed.

AFFIRMED.

123 - 23080

ELIZABETH LIENEMAN,
Defendant in Error,

vs.

CROWN AUTO LIVERY, a corporation,
Plaintiff in Error.

} Error to
Circuit Court,
Cook County.
}

209 LA 153

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is a writ of error to review the record of the Circuit Court of Cook County in an action upon the case wherein judgment was rendered against plaintiff in error and in favor of defendant in error.

The defendant in error has entered a motion to strike the bill of exceptions which has been granted.

As the only errors which are assigned and argued relate to the matters preserved by such bill of exceptions, it follows that the judgment of the trial court must be affirmed.

AFFIRMED.

ERNEST N. BRAUCHER, Appellee,

vs.

BOARD OF EXAMINERS OF ARCHITECTS
OF THE STATE OF ILLINOIS.
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

20914 55

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the respondents below from a judgment of the Circuit Court of Cook County upon the return to a petition for a common law writ of certiorari. The court granted the writ and ordered that the record of the respondent, Board of Examiners of Architects, which found petitioner guilty of gross incompetency and dishonest practices and revoked his license as an architect should be quashed.

On an affidavit of petitioner that a stenographer took and wrote up the evidence of the trial before the Board, the court ordered the respondent to set the same forth in an amended return. Of this appellants complain.

It does not appear that this stenographic report became a part of the Board's record of the proceedings and the statute does not expressly require its preservation. However, the point is immaterial as, whether we consider the record with or without what is admitted to be the evidence the judgment of the trial court must be sustained. It is the settled law that upon a return to the common law writ of certiorari, the court does not consider or weigh the evidence but examines the record solely for the purpose of

inquiring first, whether the inferior tribunal has exceeded its jurisdiction, and second, whether it has proceeded illegally. Blair v. Jennott, 134 Ill. 84; Hamilton et al. v. Town of Harwood et al., 113 Ill. 154; Joyce v. City of Chicago, 216 Ill. 466.

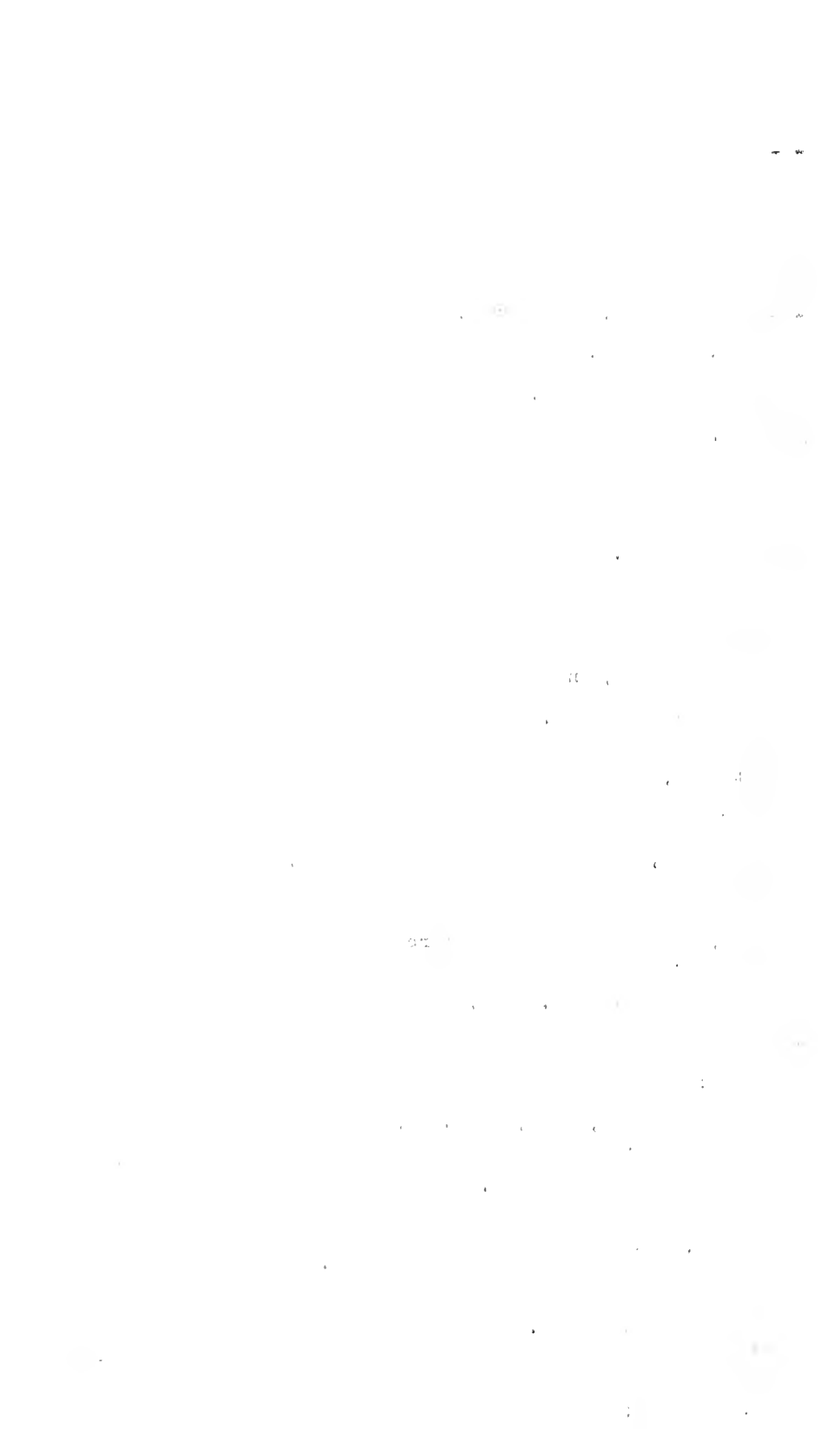
The proceeding to revoke petitioner's license was begun by a citation issued pursuant to section 10 of the Architects' Act. It required him -

" * * * * * to answer to the charges of gross incompetency in the construction of buildings and dishonest practices on your part as Licensed Architect in the State of Illinois, in the matter of the sale of four sets of plans, on or about June 27th, 1914, for the construction of two two-flat buildings, each containing five and six-room flats, one two-story store and flat building, and one three-story store and flat building; said plans being improperly and insufficiently drawn for the purposes intended, with knowledge on your part of such facts at the time of the sale of same, all of said plans having been drawn or prepared by another not under your supervision; and two of said sets of plans, bearing file numbers 56068 and 56081, each for a two-flat building, bearing your seal, which said seal was placed upon said plans by you for the purpose of misleading the public to believe that said plans were those prepared under your supervision and control, although said plans were drawn and prepared by another. * * * * *".

On July 1st, 1915, the Board revoked appellee's license by the following action as shown by the return to the writ:

"July 1, 1915, 10 a. m., board met pursuant to adjournment, all members being present. Board in executive session considering evidence heard at trial. Motion by member Stuebe, seconded and adopted by board, that in finding the verdict the words "guilty" or "not guilty" should be used in answering the roll call. Roll called; all members voted "guilty." Motion seconded and put to vote that license of Ernest N. Braucher be revoked for "gross incompetency" and "dishonest practices" - "except as to the charge of placing his seal on two sets of plans No. 56068 and No. 56081, for the purpose of misleading the public to believe that said plans were those prepared under his supervision or control." Unanimous vote of board in favor of revocation of the license of Ernest N. Braucher; * * * * *".

The citation under which appellee was tried alleged



two causes by reason of which the license of appellee should be revoked, first - gross incompetency in the construction of buildings, and second - dishonest practices as a licensed architect in the state of Illinois. It also purported to set up the acts and doings which constituted such gross incompetency and dishonest practices.

It is difficult to determine from a reading of the citation which acts in the opinion of the board constituted gross incompetency in the construction of buildings, or which constituted dishonest practices as a licensed architect. We think an examination of the citation shows that as a matter of fact, it failed to allege either.

It sets forth that the gross incompetency was in connection with the sale of four sets of plans for the construction of two flat buildings, but it affirmatively alleges that the architect did not draw the plans and that they were not drawn under his supervision, while there is no allegation that he ever approved them and (as if intending to assert that the architect was not entirely incompetent) it alleges that the fact of the plans being improperly and insufficiently drawn for the purpose intended, was a matter of which the architect had knowledge. We fail to see wherein this sets up the "doing" or "not doing" of anything which can be construed into "gross incompetency in the construction of buildings."

Neither does the citation when carefully considered set up "dishonest practices as a licensed architect", and this in the first place for the reason that only one sale or transaction is alleged in the citation. It is true there were four sets of plans, but the allegation of the citation is "in the matter of the sale of four sets of plans on or

about June 27th, 1914". We have already held in the case of Kaeseberg v. Ricker et al., 177 Ill. App. 527, that a single transaction cannot constitute dishonest practices within the meaning of the statute.

There is, however, in our opinion a further reason why the citation is wholly insufficient as to this particular charge and that is, it fails either to allege a fraudulent intent on the part of the architect, or set up facts from which such fraudulent intent might be inferred. See Kaeseberg v. Ricker et al., 177 Ill. App. 527.

Our conclusion is that the return did not show facts sufficient to give the board jurisdiction to try the petitioner. The judgment of the Circuit Court will therefore be affirmed.

AFFIRMED.

151 - 23113

NATIONAL SURETY COMPANY, a
corporation,

Appellee,

vs.

CHARLES D. STONE & COMPANY,
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 LA. 456

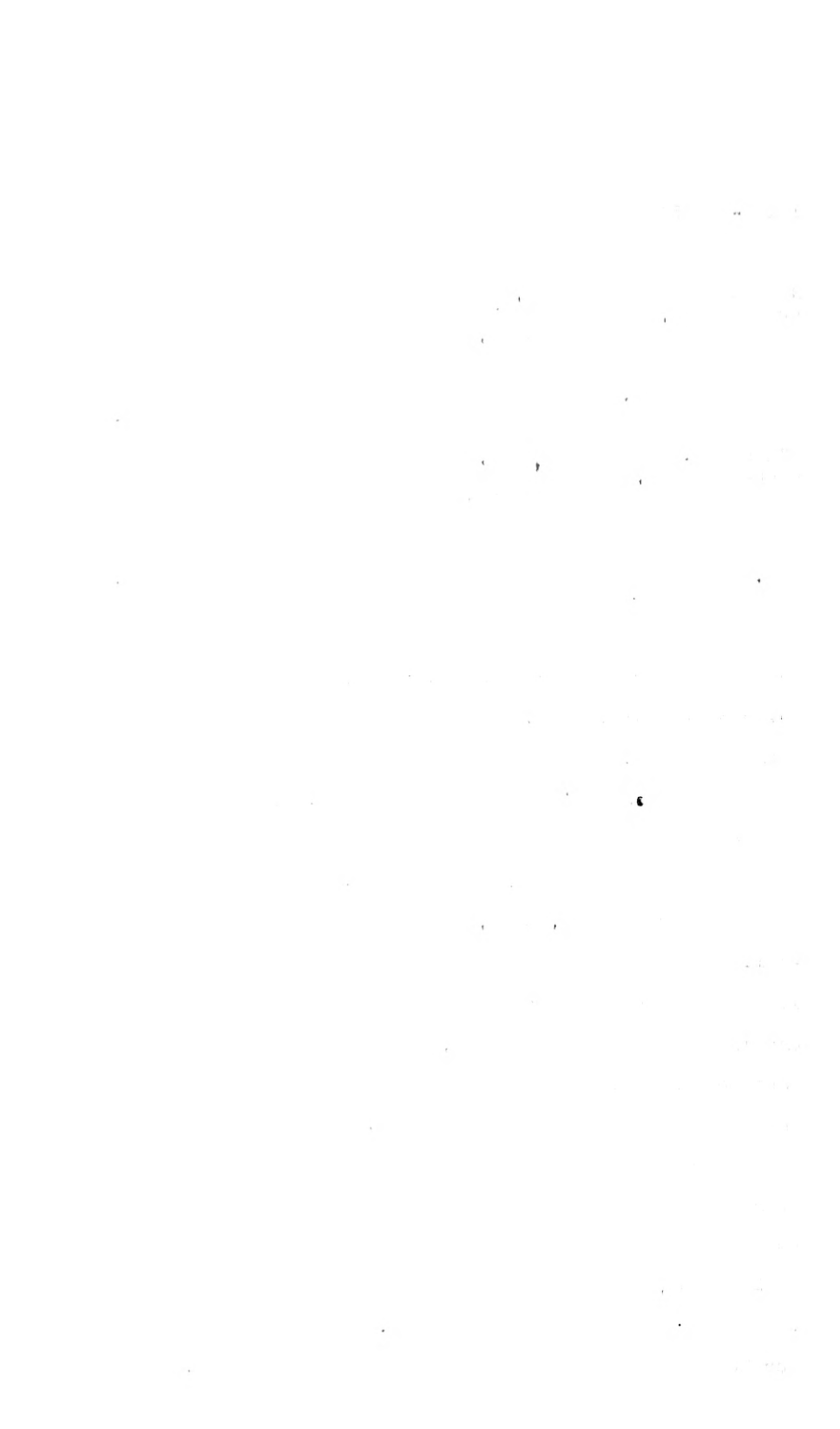
MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant below from a judgment entered by the Municipal Court of Chicago in favor of the plaintiff. The cause was tried by the court without a jury.

Plaintiff's claim was for \$300.00, alleged to be due from the defendant under the terms of a certain written agreement between the parties.

On March 3, 1913, defendant made written application to plaintiff for bonds in which it stated that its business was that of a custom house broker at Chicago and in answer to the question, "Kind of bonds required?" answered "All bonds requested by applicant that are used in passing of entries thru Customs". The writing which was signed by both parties further stated that "the undersigned requests the National Surety Company (hereinafter called the Company) to become surety on the bonds above applied for, which bonds are to be filed with the Collector of the Port of Chicago * * * * *". By its terms defendant further agreed to save the surety company harmless.

Subsequent to the execution of this contract one Baker made two importations of films which were entered



as American goods returned free from duty. The government in such cases required a certificate of exportation to that effect, or a bond conditioned to pay the duties if such certificates were not thereafter produced. The defendant acted as broker for Baker in making these importations.

It was the usual practice whenever the broker had a charge against the goods for freight or similar expenses advanced, or when he was the consignee of the goods by bill of lading, that he would enter the goods in his own name and secure bonds if necessary for which an extra charge was made to the customer.

The entry of the goods in question was originally made out in the name of the defendant, but prior to the execution of these bonds was changed to the name of Baker. This indicated that Charles D. Stone & Co. did not wish to assume responsibility for the importations.

It was the practice of the government where bonds were required, to write them up daily in a book known as the "Bond Book", and where the shipment was being handled by a broker to put the broker's initials at the right hand corner at the top of the bond page. In this case the clerk wrote upon said page the initials of the defendant and the agent for the Surety Company at the Custom House observing these initials thereupon executed the bonds with Baker as principal and charged the same to the account of the defendant.

There was no express request from the defendant that the plaintiff should so execute these bonds and there is no proof that the plaintiff had prior to this time executed any bonds of this kind for defendant's customers under similar circumstances. Baker made default and the Surety Company paid the penalty of the bonds and brings this suit

upon the theory that the defendant is liable upon its written promise to save the Surety Company harmless.

We think the contract here sued on falls short of containing a request to appellant to execute these bonds, this because of the plain language of the contract. It is claimed, however, that a custom existed from which a request might be inferred. The evidence, however, fails to establish such a custom. C. C. C. & St. L. Ry. Co. v. Jenkins, 174 Ill. 398.

Neither is a course of business between plaintiff and defendant proved from which a request to execute these bonds might be implied. There is no evidence that any similar bond prior to this time had been executed under similar circumstances by plaintiff for defendant's customers.

Neither does the evidence show any facts or circumstances which would create an estoppel as against the defendant and this for the reason amongst others that it is not made to appear that the defendant had any knowledge or was in any way put upon notice that the Surety Company was about to execute these bonds for its customer. Without such knowledge or circumstances indicating the plaintiff ought to have known, there can be no estoppel.

Since the execution of these bonds was not requested by the written contract and as there was no request from defendant to plaintiff to execute the same, nor any course of prior dealing from which such request might be implied, nor any custom from which it might be inferred, nor circumstances by which the defendant would be estopped to deny that the request was made, it must be held that the evidence did not prove a cause of action and the judgment will, therefore, be reversed with a finding of facts.

REVERSED.

151 - 23113

FINDING OF FACTS.

We find that the defendant did not either expressly or by implication request the execution on the part of the plaintiff of bonds numbers 448 and 449 for the sum of \$100 and \$200 respectively, signed by one U. B. Baker as principal, to recover indemnity for the payment of which this suit is brought.

220 - 23186

CATHERINE FIELD,
Appellee,

vs.

HENRY FRANK,
Appellant.

APPEAL FROM
COUNTY COURT,
COOK COUNTY

209 T.A. 458

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment of the County Court of Cook County entered in favor of plaintiff upon the verdict of a jury.

The plaintiff sued for \$500.00 alleged to be due for services rendered in caring for the wife of defendant during her last illness. The judgment was for \$300.00.

The plaintiff was a tenant of the defendant and lived in a cottage in the rear of the lot upon which was defendant's home. She did the washing and cleaned up the house once a week for defendant for which she was paid the sum of \$1.50 per day. For several years prior to her death, the lower limbs of the body of defendant's wife were paralyzed.

Plaintiff testified to a conversation with the defendant in which he said, "Mrs. Field, can you take care of my wife?" I said, "Certainly I will, Mr. Frank," and he said, "We will award you any way you want," and I said "That is up to you to do what you please." He said, "That will be all right, Mrs. Field; we will award you whatever you want; if you want to get the money in a lump sum or paid weekly." I said, "All right."

Plaintiff took care of Mrs. Frank from May 4th, 1912 until April 17, 1914. She testifies and it is not

contradicted that while she had theretofore worked out two days per week, she gave up that work after beginning to care for Mrs. Frank.

The defendant did not testify, but his attorney did, stating that the condition of defendant's health was such that he could not safely attend court at the time of the trial and the certificate of a physician to that effect was produced. However, no motion for a continuance was made, nor it is made to appear that defendant's deposition might not have been procured.

Appellant has argued at great length as to the improbabilities of the truth of plaintiff's testimony. These arguments are not without force. They undoubtedly, however, were presented to the judge and jury before whom the case was tried. They cannot prevail in this court in view of the admissions testified to which are not denied. We cannot say that the judgment is manifestly against the weight of the evidence and it will therefore be affirmed.

AFFIRMED.

HILLMAN's, a corporation,
Appellee.

vs.

ISRAEL LAZOVSKY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment for \$77.75 entered by the Municipal Court of Chicago.

Plaintiff's statement of claim was for 51 yards of carpet and one mat sold and delivered by plaintiff to defendant.

The evidence shows that defendant ordered a carpet at the price of \$1.50 per yard and 12¢ per yard for laying it; that the defendant directed plaintiff to send the carpet to No. 1434-36 Warner Avenue; that the carpet was sent to that number and was left rolled up in the vestibule at the bottom of the stairs from whence it was afterwards stolen.

There was evidence tending to show that prior to the theft thereof, the defendant knew that the carpet had been delivered at his building pursuant to the contract. He defends the suit on the theory that the delivery of the carpet was not complete until the same was laid.

We think the evidence shows a severable contract, one to deliver the carpet at the price of \$1.50 per yard, and the other to lay it for an additional compensation of 12¢ per yard. Therefore, when the defendant had knowledge

that the delivery had been made pursuant to the contract, the title to the carpet passed and the defendant is liable for the purchase price. The judgment will be affirmed.

AFFIRMED.

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

JOHN M. TANANEVICZ,
Plaintiff in Error.

209 I.A. 473

ERROR TO CRIMINAL COURT
OF COOK COUNTY.

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

Defendant was convicted of receiving, as a banker, a deposit while knowingly insolvent, under an indictment charging that the receiving of such deposit was in contravention of Sec. 25a, chap. 38 R. S., title "Criminal Code," from which conviction defendant seeks to escape through this writ of error.

By order of the court heretofore entered the bill of exceptions has, on motion of the State, been stricken from the record. This leaves for our review and determination only such parts of the common law record as are assigned and argued as error.

[The jury rendered a verdict of guilty and fixed the punishment at imprisonment in the penitentiary for three years and a fine of \$280. On this verdict the court sentenced defendant to the payment of a fine of \$280 and to confinement in the penitentiary for a term of from one to three years.]

It is contended that the sentence by the court is without warrant of law and is therefore a nullity and void. This is the only point argued for reversal.

The penalty for the crime of which defendant stands convicted is a fine in double the sum received as a

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deposit, and such convicted person may in addition to the fine be imprisoned in the penitentiary for not less than one nor more than three years.

It is argued that under the act in force July 1, 1917, relating to paroles, the jury had no power to fix the punishment of defendant in a verdict finding him guilty, and that the court had no power to vary such verdict by pronouncing the punishment which it did. Sec. 3 of the 1917 act reads:

"That except for the crimes enumerated in section one of this Act every person, male or female, over 10 years of age, who shall be adjudged guilty of a felony, or other crime punishable by imprisonment in the penitentiary, or by imprisonment either in the penitentiary or jail, and as to whom the court shall not have assessed the jail sentence, shall in all such cases, except as herein otherwise provided, in clauses one to four, inclusive, be sentenced to the penitentiary, and the jury in its verdict in such case and the court imposing such sentence, shall not fix the limit of duration of same, but the term of such imprisonment shall not be less than the minimum term nor shall it exceed the maximum term provided by law for the crime or offense of which the person is convicted, making allowance for good time as is provided by law."

Defendant insists that under the ruling in Cole v. People, 84 Ill. 216, the judgment must be reversed. In the first place, the question, though decided, was not before the court for decision, as no error had been assigned challenging the correctness of the sentence of the court, which varied from the verdict of the jury. The opinion on this point was clearly obiter dicta, for the judgment was affirmed by a divided court. While the Cole case has not been expressly overruled, it has not since been followed. Moreover, in the cases hereinafter cited the Cole case has been varied and a different rule applied.

Conceding that the contention that the jury had no right to fix the punishment of defendant in its verdict is well taken, still all matter following the finding

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of guilty may be regarded and treated as surplusage. The verdict was complete, disregarding the words fixing the punishment. On that verdict, minus the surplusage, the court might rightfully pass an appropriate sentence in conformity with Sec. 3, Chap. 38 supra, which it did.

In Armstrong v. The People, 37 Ill. 459, the jury assessed a fine as well as imprisonment, the fine being unauthorized; nevertheless the court passed sentence in accord with the verdict, and the Supreme Court in its opinion sustaining the judgment said:

"It is conceded on both sides that it was not competent for the jury to impose a fine upon the prisoner - they had only to determine the question of guilt, and to fix the term of imprisonment if found guilty. The question then arises, does this imposition of a fine by the jury vitiate the verdict?

The old maxim, utile per inutile non vitiatur, is a salutary maxim, and is recognized in criminal, as well as in civil cases. The useful portion of this verdict is the finding of guilty, and finding the term of imprisonment; the useless or superfluous portion is the imposition of the fine. Without this portion of the verdict, the finding of the jury is unexceptionable on this point. This part of the verdict then must be held as surplusage, and as such, not vitiating the other part, which the jury properly found. * * * * *

What injury could possibly result, or could be worked to the prisoner, from the fact that the jury assumed the right to impose a fine? We can see none. On the contrary, such action of the jury, on the supposition they had the power to fine, doubtless induced them to fix a short term of imprisonment, so that the prisoner was really benefitted by such mistaken action. And the court, in adopting the judgment of the jury as its judgment, as to the amount of the fine, relieved the prisoner from a heavier fine which the court might have imposed."

Henderson v. The People, 165 ibid 607, is on fact and principle controlling. The jury in a verdict of guilty had fixed the punishment at fourteen years and the court enforced it by sentence. In deciding the contest the court said:

1. The first part of the report is a general introduction to the subject.

2. The second part of the report is a detailed description of the methods used.

3. The third part of the report is a discussion of the results obtained.

4. The fourth part of the report is a conclusion and a list of references.

5. The fifth part of the report is a summary of the work done.

6. The sixth part of the report is a list of the names of the authors.

7. The seventh part of the report is a list of the names of the institutions.

8. The eighth part of the report is a list of the names of the sponsors.

9. The ninth part of the report is a list of the names of the reviewers.

10. The tenth part of the report is a list of the names of the publishers.

11. The eleventh part of the report is a list of the names of the distributors.

12. The twelfth part of the report is a list of the names of the agents.

13. The thirteenth part of the report is a list of the names of the printers.

14. The fourteenth part of the report is a list of the names of the binders.

15. The fifteenth part of the report is a list of the names of the framers.

16. The sixteenth part of the report is a list of the names of the mounters.

17. The seventeenth part of the report is a list of the names of the restorers.

18. The eighteenth part of the report is a list of the names of the conservators.

19. The nineteenth part of the report is a list of the names of the curators.

20. The twentieth part of the report is a list of the names of the librarians.

21. The twenty-first part of the report is a list of the names of the archivists.

22. The twenty-second part of the report is a list of the names of the paleographers.

23. The twenty-third part of the report is a list of the names of the epigraphists.

24. The twenty-fourth part of the report is a list of the names of the numismatists.

25. The twenty-fifth part of the report is a list of the names of the philologists.

26. The twenty-sixth part of the report is a list of the names of the linguists.

27. The twenty-seventh part of the report is a list of the names of the historians.

28. The twenty-eighth part of the report is a list of the names of the geographers.

29. The twenty-ninth part of the report is a list of the names of the astronomers.

30. The thirtieth part of the report is a list of the names of the meteorologists.

"The verdict, however, was in all respects formal, and sufficient to authorize the court to pronounce a proper sentence. While the jury had no right to fix the punishment, that part of the verdict will be treated as surplusage, and the court will be directed to enter a proper judgment on the verdict. Baxter v. People, 3 Gilm. 368; Martin v. Barnhardt, 39 Ill. 9; White v. People, 81 Id. 333; Harris v. People, 130 Id. 457; Wallace v. People, 159 Id. 446."

The case was remanded for a sentence in accord with the verdict of guilty after disregarding as surplusage the punishment fixed in the verdict. People v. Boer, 262 ibid 152.

In Statler v. United States, 157 U. S. 277, there was a verdict of "guilty on the first count," and these words following - "for having in possession counterfeit minor coin" - were held to be superfluous and were so treated by the court's affirmance of the judgment.

The fixing of the punishment by the jury in its verdict was, as it should have been, treated as surplusage by the court and the punishment fixed by the statute was imposed by the court without regard to the superfluous words of the verdict.

The judgment of the Criminal Court is right and is affirmed.

AFFIRMED.

WALTER L. MANNING and
LULU MANNING, Appellees,

vs.

JACOB L. KESNER, Appellant,

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 175

MR. PRESIDING JUSTICE HOLDEN
DELIVERED THE OPINION OF THE COURT.

This is an action by the lessees against their lessor for a breach of a covenant of the lease between them whereby there was demised to the lessees the whole of the fourth floor of the building numbered 214 and 216 South State street, Chicago, except the elevator, hallways, etc., in which the plaintiffs, the lessees, were to carry on the business of cleaning, dyeing, bleaching and selling hats, trimmings and feathers. On a trial before court and jury plaintiffs had a verdict and judgment thereon for \$1100 and defendant appeals.

The lease contained this provision:

"The lessor shall have the right at any time during the term of this lease to entirely remove the hallways, elevator, stairways and entrance of the building in which the demised premises are located, or either or any of them, and to discontinue the use thereof as an entrance and passageway to and from said demised premises, and in place thereof to create an entrance to the building in which the demised premises are located and the demised premises through the building adjoining the said building on the south thereof and now known as the Consumer's Building and through the wall now dividing said building in which the demised premises are located and the said Consumers Building."

There was likewise a provision concerning installing a dumb waiter in the rear or west 50 feet of the premises demised against either the inside of the north or south wall, to be selected by the lessor.

Defendant urges for reversal errors of the trial court in its rulings upon the evidence and in giving and refusing to give certain instructions to the jury.

The plaintiffs were in possession of a part of the demised premises carrying on the business which the lease by its terms permitted at the time the lease with the covenant above recited was entered into.

The entrance to the demised premises at the time of their demise was into that portion of it used by plaintiffs as an office and salesroom. During the early part of the term this entrance was closed and a new entrance made into the demised premises through the rear of the premises in which the workroom was situated, so that persons thereafter visiting plaintiffs' establishment could not get into the office or salesroom without going through the workroom. Plaintiffs, on the contention that the change was not one contemplated by the covenant in the lease or the understanding of the parties and was detrimental to their business, some time thereafter removed from the premises and instituted this suit for damages. Among the items of damages claimed were loss of good will valued by plaintiffs at \$2,000, and enhanced rental value of the demised premises beyond the reserved rental was claimed to be \$3,309.

Evidence was offered and received against the objection of defendant relating to conversations between defendant's agent and the plaintiffs at the time the lease was delivered regarding the location of the new entrance, if one should be made, which plaintiffs claimed the agent stated would be from the office through the Consumers building. Defendant argues that this testimony was an attempt to change a written contract by a parol undertaking.

However, we do not regard this evidence as in

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any manner seeking or tending to change the writing of the parties. The purpose was to enable the court to construe the covenant in the light of the situation of the parties at the time the writing was executed. This became necessary because, while the lease provided for the closing of the existing entrance, it was silent as to the place where the substituted entrance should be located. The agent with whom the transaction was had gave his version of it as a witness for defendant, and it therefore became the duty of the jury to determine by their verdict which of the two contradictory statements they regarded as most reliable and find the facts therefrom. If it was sought by the testimony of the plaintiffs to change in any way the substance or the terms written in the lease, then the contention of defendant would be well taken and the authorities cited in support of such contention in point. But such was not the purpose, effect or scope of this testimony. The purpose was to put the court in the situation in which the parties were at the time of the transaction, wherefrom the court might interpret the clause in dispute and give effect to it in accord with the intention of the parties at the time the lease was made. Barber v. Allen, 212 Ill. 125. In Auditorium Ass'n v. Fine Arts Building, 244 ibid 532, a similar case upon principle, it was held that preliminary negotiations, including the written options preceding the execution of a 99 year lease, were proper to consider for the purpose of determining the meaning and intention of the parties in the use of the words employed in the lease, although not for the purpose of varying or contradicting the plain terms of the lease. This was an affirmance of the same doctrine as laid down by this court in the same case. 150 Ill. App. 262. So in the instant case the ~~xxxx~~ conversations attending the making of the lease were admissible for

the purpose of determining the meaning and intention of the parties in the use of the words employed in the lease as to where the substituted entrance should be located were the same thereafter constructed under the terms of the lease, giving that right to defendant, but not for the purpose in any respect of varying the words of the lease. To aid in the attainment of this object it was said in Street v. Chicago Wharfing Co., 157 Ill. 605:

"The court will, if necessary, put itself in the place of the parties and read the contract in the light of the circumstances surrounding them at the time it was made and of the objects they then evidently had in view. So, also, the acts of the parties themselves, indicative of their construction placed upon it may be resorted to, for the purpose of determining the true meaning of the written agreement. And in this regard it makes no difference whether such acts are contemporaneous or subsequent."

It was therefore not error to admit the evidence regarding the understanding of the parties as to where the substituted entrance should be located. It would seem only reasonable that such entrance should be placed where it could be advantageously used, not placed, as it was, where its use was destructive to the business of plaintiffs and greatly impeded its conduct.

Plaintiffs, who were well informed on all substantial matters concerning the value of the good will of their business, if any it had, were competent as witnesses to testify as they did as to such value. Their testimony covered every important element and it stands without contradiction. That the evidence was not more full and specific was owing to the objection of defendant. In this regard it cannot now be heard to complain. Mahl v. Brooks, 213 Ill. 134. There was sufficient evidence from which the jury might find the value of the good will. This good will was destroyed by the unwarranted act of defendant in placing the new entrance

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to the demised premises at an improper place, contrary to the contract of the parties. Good will of a trade consists merely in the probability that the old customers will continue their patronage of the old place. Douthart v. Logan, 86 Ill. App. 294. The owners and operators of a business are competent witnesses as to the value of its good will. White v. Jones, 79 N. Y. S. 583.

We are conscious of no error in giving or refusing to give the instructions challenged by defendant, and it certainly was not error to refuse defendant's request to instruct a verdict in his favor.

The record is free from reversible error and the judgment of the Municipal Court is affirmed.

AFFIRMED.

PETER LORENZ, doing business
as Lorenz Motor Service,
Appellee,

vs.

HANS P. JENSEN and NIELS M.
STERNHILL,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

209 T.A. 184

MR. PRESIDING JUSTICE HOLDEN
DELIVERED THE OPINION OF THE COURT.

On a trial before the court there was a finding and judgment for \$672.22, and defendants appeal.

Defendants owned a flat building numbered from 2614 to 2644 North Spaulding avenue, Chicago, and by a contract in writing employed F. S. Kunkel & Co. as their agent in operating the same. In this contract authority is given the agent to buy supplies, etc. This action is for balance due for coal ordered by the agent for and delivered to defendants' flat building, which coal was consumed in the furnaces of the flat building. The ordering and delivery of the coal is denied neither by the affidavit of defense nor by proof, as defendants proffered no testimony in contradiction of the case made by the evidence of plaintiff. The defense argue the lack of authority in F. S. Kunkel & Co. to do other than buy supplies for cash. There was proof, without contradiction, that plaintiff had, prior to the delivery of the coal in dispute, delivered coal to defendants' building upon the order of defendants' agent, and that such coal had been paid for; and that some of the coal, payment for which is sought in this suit, was delivered upon the special request of the defendant Jensen, because, as Jensen

stated in his request for the coal, the supply in the building was so low that there was danger of the pipes freezing, as the temperature was below the zero mark.

Plaintiff proved the ordering of the coal by the agent of defendants, also the delivery of the coal to and its consumption in the building of defendants, likewise the amount due and unpaid for such coal, which is the amount of the judgment in this appeal. This certainly established a prima facie case against defendants, imposing upon them, without countervailing proof, a liability to pay the claim so proven. No testimony was proffered to meet the case so made by plaintiff. In the circumstances of this case, aside from the question of the authority of the agent to buy the coal, we know of no principle, legal or moral, which will excuse defendants from payment. Proof of delivery of the coal was made by the evidence of the agent of defendants and the janitor in charge of the building.

It is clear that the defenses interposed lack merit and must therefore have been made for delay. This is a case calling for the assessment of statutory damages. Town v. Alexander, 85 Ill. App. 512.

The judgment of the Municipal Court is affirmed with \$67 damages assessed against defendants.

AFFIRMED WITH \$67 DAMAGES
ASSESSED AGAINST DEFENDANTS.

JOSIE MARKUS, alias JESSIE
MARKUS,

Appellee,

vs.

ARTNA INSURANCE COMPANY OF
HARTFORD, CONNECTICUT,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 - 4 - 101

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

On a trial before court and jury plaintiff had a verdict and judgment for \$1000 and defendant appeals. The action is on a fire insurance policy in the sum of \$2,000, the building insured having been damaged by fire to the amount recovered.

Plaintiff was in possession under contracts of sale of two adjoining lots on which the building insured was located. At the time the contracts of sale were made this building, subsequently remodeled, was the property of a tenant in possession under Bartlett, plaintiff's vendor in the contracts, from whom plaintiff acquired the building. This building had been used as a barn when the two lots under contract to plaintiff, with much surrounding land, had been operated as a farm. The barn covered more than plaintiff's two lots, and it was the east half of the barn which plaintiff bought of Farlin, the lessee. The west half of the barn was torn down by the purchasers thereof.

The husband of plaintiff was a building contractor, and under his direction workmen proceeded to remodel the east end of the barn as required by plaintiff. The changes made were quite extensive. It was remodelled for a school house and was designated as such in the policy in suit.

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On March 18, 1915, before completion of the alteration, the building was destroyed by fire. There was evidence tending to prove the value of the building at the time it was burned.

It is argued for reversal that the judgment is not supported by the evidence; that there was misrepresentation of material facts regarding the insurance; that the interest of plaintiff was not correctly stated in the policy; that the building insured was not on ground owned by plaintiff in fee; and that the broker procuring the insurance was the agent of plaintiff.

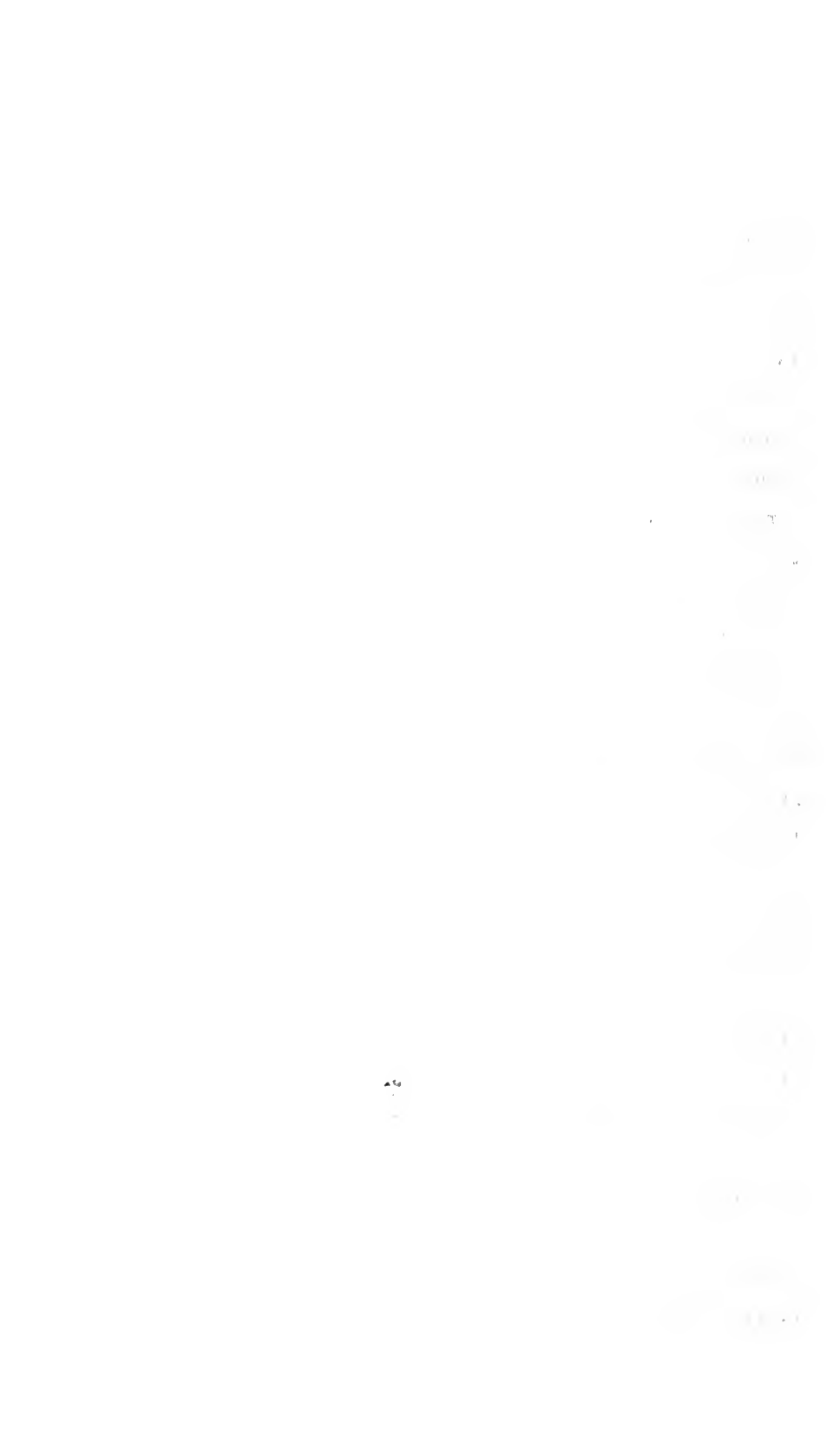
We think there is sufficient evidence from which the jury might reasonably find that plaintiff had proven all essential elements necessary to maintain her action, and that there is also evidence in the record on the part of plaintiff which would, if given credence by the jury, warrant the verdict which it rendered. The elements of insurable interest, the issuing of the policy of insurance by defendant to plaintiff upon the building against fire, the giving of notice of loss, in accord with the terms of the policy, the occurrence of the fire and the damage which the building suffered as the result of such fire, were present in plaintiff's proofs as well as the fact - which the jury presumably arrived at in reaching its verdict - that the insurance policy sued on was fairly and legitimately obtained and no fraud or misrepresentation practiced upon the part of plaintiff in obtaining it.

The insurance policy in suit was proven to have been procured through an agent of the defendant company, to whom plaintiff fairly disclosed all the essential facts regarding her interest in the property and its location and the claim by which she held title. This agent was

shown plaintiff's contract with Bartlett, her vendor, which contract not only disclosed her interest in the land but from it was copied into the policy the description of the land upon which the insured building was situated. It is in evidence also that this agent had seen the building and had knowledge of its surroundings; that he knew or had means of informing himself of the fact that the building was part of an old barn which was in process of remodeling, with the intention of using it as a schoolhouse when completed.

By the express terms of the policy permission was granted for alterations and repairs and to complete the building. This provision in itself is ample to charge defendant with notice of the fact that the building was in process of being changed and altered. Home Insurance Co. v. Mendonhall, 164 Ill. 458, is authority for the principle that a party has an insurable interest in the insured premises, notwithstanding the fact that the fee of the land upon which the building insured is situate was not vested in the insured; and it was also there held that a party has an insurable interest in property from the existence of which he receives a benefit or from the destruction of which he will suffer a pecuniary loss, although he has no title in or possession of the premises. In the instant case plaintiff was in possession of the land upon which the burned building was situated under a contract of purchase. Her interest was such that if such building was damaged by fire she would suffer pecuniary loss; therefore she had an insurable interest which was covered by the terms of the policy in suit.

cd | Defendant insists that the trial Judge invaded



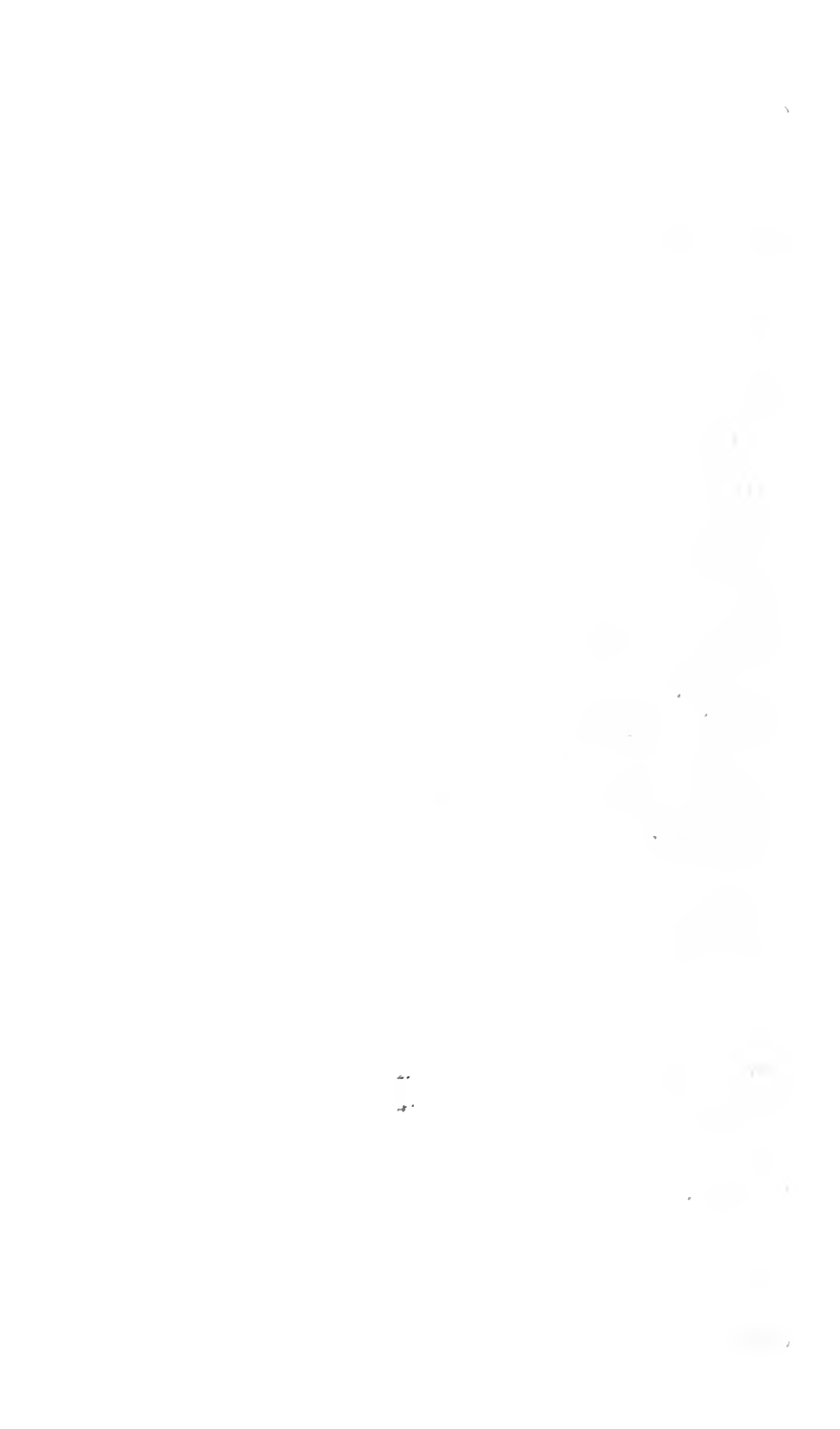
the province of the jury in his instruction to the jury regarding the question as to whether the party who took the insurance and delivered the policy was the agent of defendant. The instruction complained of was orally given, as allowed by the Municipal Court Act, and is in the following language:

The court gave orally the following instruction:

"Now I think it is the law of this State that if one purports to act as the agent of an insurance company and receives application for insurance and accepts the premium upon such insurance, goes to the company and secures the policy of insurance and returns the policy to the assured, and does everything that is necessary to do to accomplish the issuance of the insurance, I think it is the law of this State that the insured in this case, the plaintiff, would have the right to assume that this representative was the proper representative with proper authority to do whatever he did do in the issuance of the policy, whatever was necessary in the issuance of that policy and that to the extent of bringing knowledge of the conditions of the property he was the representative of the defendant, and if you believe from the evidence in this case that the representative of the plaintiff, that is the plaintiff's husband, fully and fairly stated to this representative the condition of the title to that property, the condition of the property itself, the character of the property, and that he wilfully concealed nothing that the defendant ought to know with respect to the property, then I think the defendant is not in a position here, gentlemen, to say that it has been deceived or misled by the plaintiff in this case, who is bound by the acts of its representative."

We think the legal proposition was fairly stated to the jury in this instruction and that the jury were neither misled as to the law nor was its province to determine the fact invaded by the instruction, which gave the jury light on the law through which it could determine the fact.

Counsel for defendant attempted to impeach, upon an entirely immaterial matter, plaintiff's husband, who testified in her behalf, and argue that the ruling of the court in sustaining the objection to such testimony was



erroneous. In this regard the ruling of the court was in ^{the} accord with well established legal principle that evidence of matter immaterial to the issue is not competent as impeaching proof.

It is urged for defendants that the contract of insurance against loss by fire is a contract of indemnity and that it is contrary to public policy that the same should be made a matter of profit or speculation to the insured, and we are aided to a recent decision by this court in Schultz v. The Home Insurance Co., general number 22044, not yet reported, as sustaining this contention. With the contention as a legal principle we find no fault, but the Schultz case supra is in no wise applicable upon the facts to the instant case.

Finding no reversible error in the judgment of the Municipal Court, it is affirmed.

ATTORNEY.

THOMAS MCGUIRE, doing business
as MCGUIRE & WHITE DETECTIVE
AGENCY,

Appellee,

vs.

CITY OF CHICAGO,
Appellant.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

203 A. 193

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is a suit to recover money paid as detec-
tive license fees for the years from 1910 to 1915 under a
city ordinance held to be void in City of Chicago v. O'Brien,
268 Ill. 229.

The questions in this case have recently been
decided by this court in Rath v. City of Chicago, General
Number 22985, not yet reported.

The elements of void ordinance, payment under
decrees and with protest in the Rath case we find present
here, and for the reasons stated in that opinion the judg-
ment of the County Court is affirmed.

AFFIRMED.

344 - 23689

JAMES CHESNEY and E. L.
CHESNEY, trading as
Chesney Sheep Co.,
Appellees,

vs.

UNION PACIFIC RAILWAY
COMPANY, a corporation,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

208-A. 494

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$1419.37 rendered against defendant on the verdict of a jury. It is a case of shipper against carrier and involves the carriage of nine cars of sheep consisting of lambs and ewes from Altamont, Wyoming, to South Omaha, Nebraska, which shipment was diverted to Chicago by agreement with defendant. The damage to the sheep is alleged to have occurred in transit through negligence attributable to defendant as the initial carrier. The shipment was in charge of one of the plaintiffs and an employee, whose duty it was to properly care for the sheep in the cars and while being watered and fed en route.

While many errors are assigned, those argued relate principally to the rulings of the court in the admission of evidence, the refusal to direct a verdict at the instance of defendant, and in giving and refusing to give certain instructions.

The witness Chesney gave in his testimony a minute description of the sheep, their breeding and raising, their condition at the time they started upon their journey, and all happenings to them on the way from their native

grazing grounds to Chicago, he having made a memorandum detailing every occurrence of importance from the start of the journey to arrival at Chicago. He testified from such memorandum against the objection of defendant, who also objected to its being received in evidence. He also testified as to the weight of the sheep when they started on their journey and as to the weight of such of them as survived and arrived at their destination. These were not actual weights, but estimates of the witness. Chesney's testimony proved that many of the sheep died during transit, that about all of the survivors were in a very damaged and ill condition when they were finally unloaded in Chicago, and that deaths, damaged and ill condition of the sheep were attributable to the negligence of defendant en route. The trouble seems to have started at Cheyene, where the sheep were fed unwholesome hay provided by defendant. Other damage was claimed to have resulted from unnecessary jolting of the cars and unusual and unnecessary delays in transit. As the result of the jolting the sheep were knocked about and crowded in the ends of the cars, causing them to trample on each other, seriously injuring many of them. At another point the cars became derailed, injuring some of the sheep. Between Valley, Nebraska, and Kirkland, Illinois, thirty dead sheep were removed from the cars.

On September 10, 1913, the sheep arrived in Chicago and were sold. After their sale and on September 13, 1913, notice of damage and claim for loss was served on defendant at Omaha. Claim for damage was also served at Chicago on the day of arrival on the agent of the Milwaukee road, the connecting carrier.

The testimony of Chesney as to the progress

of the train carrying the sheep, the stops and delays occurring and the points at which there were delays and casualties to the sheep, was evidence at least tending to prove the averment of the declaration that the sheep were not safely and securely transported and were not delivered at destination within a reasonable time.

We know of no rule of law inhibiting the witness from refreshing his memory from memoranda made by him at the time of the occurrences about which he testifies, or from reading therefrom when his memory fails. Nor do we think that after such memoranda has been proven and used by the witness in testifying it is reversible error to admit the same in evidence. From this memoranda the jury would have the means of ascertaining whether the testimony was in accord therewith or whether the witness had departed therefrom in any material particular. Nor do we think that with the experience of the witness in such matters it was not permissible for him to testify as to the reasonable time the journey should have taken. If the witness had been in error on such matters, countervailing proof was accessible to defendant. The testimony of this witness as to the weight of the sheep when they left pasture for shipment and the average loss in weight during transit was admissible. This witness was an experienced grazer, had been with the sheep from their birth and knew all about them. He was competent to testify about such matters. Looney v. Oregon Short Line, 192 Ill. App. 273, sustains the correctness of the court's ruling in allowing Chesney to testify as to the reasonable running time of the train from point of loading to destination.

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At the time defendant moved for an instructed verdict there was evidence which, with all legitimate inferences therefrom, presented questions of fact which it became the province of the jury to determine, but did not present questions of law for determination by the court. In this regard the ruling of the court was not erroneous. A review of the record discloses proof of sufficient probative force which, if given credence by the jury, sustains the verdict; therefore we cannot hold as matter of law that the verdict is contrary to the proofs. There is evidence in the record from which the jury might properly find that there was, after allowing the necessary time to care for the sheep at feeding points, an unreasonable delay of the shipment in transit and that such delay was negligence on the part of defendant which caused plaintiffs to suffer damage in the amount of the jury's verdict.

The notice of claim for damage was given to defendant in apt time and within the ten days stipulated in the shipping contract. We think the notice given was a sufficient compliance with the contract and within the holding in Seawell v. C. S. L., 192 Ill. App. 273, whether such notice was given before or after the intermingling of the sheep with other stock. G. F. & A. R. R. v. Plish Milling Co., 241 U. S. 190.

The change in destination made with the consent of defendant did not operate to relieve it from liability for damages arising from the negligence of the connecting carrier en route to the point of destination. Gamble-Robinson Co. v. Union Pacific R. R. Co., 180 Ill. App. 256. Defendant still remained liable after change of destination, under the Carmack Act for damage occurring to the shipment while in charge of the connecting carrier en

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route from the line of defendant to ultimate destination at Chicago.

We think the jury was correctly instructed upon the law of the case and in accord with the theories of each of the parties. The instructions taken as a whole were sufficient to enable the jury to apply the law in determining the facts before it. Instructions tendered by defendant and refused by the court were substantially embraced in the given instructions. We find no reversible error in the rulings upon instructions.

For the reasons stated the judgment of the Circuit Court is affirmed.

AFFIRMED.

LOUIS C. KRUEGER,
Appellee,

vs.

ROXFORD KNITTING COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

209 T 1 96

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$468.50 entered upon the finding of the court to whom the case was submitted for trial, and is between master and servant for wages and damages claimed upon the discharge of plaintiff, which he claims was violative of his contract, which was a hiring from January 1, 1916, to December 31, 1917, at a salary of \$250 a month.

The evidence demonstrates beyond cavil that plaintiff was an unfaithful servant, derelict in his duty to his employer, wasteful of its time and also guilty of misappropriating its funds. Plaintiff claimed \$125 as wages to October 31, 1916, and gave credit for \$107.50, money in his hands belonging to his employer, which he claimed left due him \$17.50 for wages, and also claimed \$500 for damages for breach of contract in discharging him before its termination by lapse of time. The amount conceded by him to be in his hands belonging to defendant was wrongfully withheld by him. This amount was not the true amount. He had \$222.10, while he accounted for but \$114.60. In his expense account he was guilty of speculation. He charged \$16.10 for a luncheon for which he in fact paid but \$6.25, \$21.50 for extra help in October, 1916, which help he never employed, \$1.25 for furniture

polish for which he paid but 25 cents, \$3.25 for cleaning rugs which plaintiff admitted should have been but \$2.25. Plaintiff also charged \$3.00 as money paid to one L. Gauter for polishing and fixing office furniture. Gauter testified that while he did the work he never received from plaintiff any pay therefor.

Misconduct of an employee such as above recited is sufficient justification for terminating by the employer any contract of employment. The acts of which plaintiff was guilty were ample cause warranting a termination of his contract with defendant, for the law does not require the master to retain in his employ an unfaithful and dishonest servant, and the evidence discloses that plaintiff was both.

Therefore the judgment of the Municipal Court is reversed with a judgment of nil capiat and for costs in this court.

JUDGMENT REVERSED AND JUDGMENT
OF NIL CAPIAT HERE.

396 - 23741

ROBERT J. GARLICK,
Appellee,

vs.

S. I. SHANE, doing business
as Shane & Company,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 - A - 497

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This appeal presents but one question for our determination, which is - Did the trial Judge act contrary to rule 13 of the Municipal Court and the discretion thereby reposed in him in denying the motion of defendant for a continuance?

The record shows that the cause was twice on the trial call, and that it was continued once at the instance of defendant's counsel. At the time the cause was continued it was set by the trial Judge for hearing April 16, 1917, with the admonition to defendant's counsel that they must be ready to proceed to trial, and that if the counsel who claimed to have charge of the case could not try it, some other member of the firm, which it appears was composed of four lawyers, must be ready to proceed to trial. In the teeth of this action by the trial Judge, counsel for defendant, on April 16, 1917, without previous notice to plaintiff or his counsel, made a motion to again continue the case for eight days and presented for the first time an affidavit of one of the counsel that he was actually engaged in the trial of another case, had been for several days so engaged, and that such trial would continue several days longer. It appeared that plaintiff's witnesses were then in court, that

he was ready to proceed to trial, and that he thereupon resisted the motion to further continue the hearing. It also appeared that on the previous occasion when the case was on the trial call, plaintiff was present with his witnesses ready for trial, and that the Judge presiding was so informed and was likewise told that plaintiff's witnesses were experts and their time valuable. It further appeared that the representative of defendant's counsel who made the motions for continuances was himself a member of the bar and a practicing lawyer.

Rule 13 regarding continuances has this provision:

"Provided that a sound discretion will be exercised by the court in the enforcement of this rule in extreme cases; * and also in all cases where any substantial injury might result."

Counsel contend that this rule is mandatory and not discretionary. The rule is shown from its reading to be clearly discretionary. Was it fairly exercised? We are at a loss to conceive how, in the circumstances developed by the record, the court could have acted otherwise than it did. To have granted a further continuance would have been unjust. Here is a case involving a comparatively small amount, in which the claimant appeared twice with his counsel and witnesses before his case was tried. All the motions for continuances were made without previous notice to plaintiff's counsel. Such action was, to say the least, inconsiderate of the rights and convenience of plaintiff. It is delays of the character here sought and partially gained which tend to bring the law into disrepute.

We thoroughly agree with the reasoning of the court in N. W. B. etc. Ass'n v. Prim, 19 Ill. App. 224, where it is said:

"It is sufficient to say upon this point, that the courtesies existing between members of the bar, and recognized by trial courts, will usually in such cases enable counsel to postpone a cause for a few days in one of the courts so as to enable him to be present at both trials. But this is purely a matter of grace and not of law. The rights of litigants in one court are not to be determined by the condition of the docket in another, nor because an opposing counsel has assumed duties in different courts which may conflict. Why should appellee be denied a speedy trial of his cause, that a delay, which might be of great injury to him, would enable his opponent's counsel to carry on a more extensive and lucrative practice; or, upon what theory could a court organize to administer justice speedily and impartially, be justified in aiding such a scheme by granting a continuance for such a cause?

It was the duty of appellant and its counsel to know whether he could be present and try the cause, and if his duties elsewhere would prevent his taking charge of the trial, other counsel should have been employed in time to prepare for the trial. Its failure to do so was negligence, the consequence of which, the court below properly held, ought not to be borne by appellee."

These observations are equally in point in the instant case. The trial Judge did not abuse the discretion reposed in him by law and rule 13 ante, and it therefore follows that the denial of the motion for a further continuance was without error, and the judgment of the Municipal Court must be and is affirmed.

AFFIRMED.

OLNEY J. DEAN & COMPANY,
a corporation,

Appellee,

vs.

WILLIAM HAYOR CO., a
corporation,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

20914-498

MR. PRESIDING JUSTICE HOLDOM

DELIVERED THE OPINION OF THE COURT.

On a trial before court and jury plaintiff had a verdict and judgment for \$262.04, and defendant appeals.

Defendant was the general contractor in the construction of a residence at Lake Forest, Illinois, for one Harold F. McCormick. The plaintiff was a sub-contractor for certain twisted steel rods which were ordered by defendant and wrought into the McCormick structure. These contracts were entered into respectively in September, 1912, and January, 1913. A settlement was had between the parties as to all their matters, excepting two invoices, one for \$82.01 and the other for \$135.45, which together made \$217.46. On May 2, 1913, defendant made a statement of account, including in it six items aggregating \$721.29, and sent plaintiff a check for that amount. This payment was to cover the six items in the account, and before signing the receipt, plaintiff, for greater clarity, wrote on it, "It is understood that this receipt does not cover the \$217.46 shown by our invoices #803-a and #803-b, which is extra material ordered as per your letter of Jan. 18, 1913, to us." The receipt, so endorsed, was received by defendant without objection thereto or the raising of any dispute as to its accuracy. The two items referred to

the items for which the check was sent and received. Nor is this fact seriously disputed by defendant. In defendant's affidavit of defense it admitted the correctness of the item of \$82.01 plus \$15, and then, by way of "recoupment and set-off" claimed \$991.61. This counter-claim consisted of two items, one for \$241.61, cost of straightening and reinforcing certain rods which were claimed to be bent and twisted, and the other for \$750 for heating the McCormick premises, made necessary by plaintiff's alleged delay in furnishing material according to contract. Defendant also contended that the check for \$721.29 was in full payment and settlement of all of plaintiff's claims embracing those in suit.

We think it clear that the check for \$721.29 was sent and received in settlement of plaintiff's claim for work and material furnished on the McCormick residence, with the exception of the two items in dispute in this suit, and that that settlement was the culmination of negotiations between the parties and made with full knowledge of the condition of the account. Moreover, the acceptance without dispute or question of the receipt from plaintiff by defendant, with the memoranda regarding the two bills aggregating \$217.46, operated as an acquiescence in the statement and an acknowledgment that the two items of account therein mentioned remained at that time unsettled.

Defendant's claim that certain rods were its property is untenable. Such contention is without support even in the evidence of defendant. All the rods which were worked into the McCormick residence by plaintiff were its property. The fact that some of these rods were on the McCormick property at the time the order in dispute was given in no way affected the right of plaintiff to recover

therefor. While such material had been shipped to Lake Forest prior to the contract of January 18, 1913, still it was the property of the plaintiff, out to meet the requirements and went into the structure of the McCormick residence.

The check for \$721.29 was sent in full settlement of the September, 1912, contract, and as to that contract was an accord and satisfaction. The items of material set out in the account accompanying the check included those in the contract of September, 1912, and did not include any items in the contract of January, 1913.

We see no reason for defendant's disputing plaintiff's claim, and therefore its withholding payment was in law vexatious. Chicago Brick Co. v. McLeester, 165 Ill. App. 114. Furthermore, the \$217.46 sued for was money due under a contract in writing, and interest was therefore allowable in virtue of Sec. 2, Chap. 74 R. S. Dick v. Sherwood, 157 Ill. 325; Heissler v. Stose, 131 ibid 393; Scrogge v. Cunningham, 81 ibid 110.

The judgment of the Municipal Court is right and is therefore affirmed.

AFFIRMED.

J. B. KILROY,
Appellant,

vs.

JUSTRITE MANUFACTURING
COMPANY, a corporation, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 499

MR. PRESIDING JUSTICE HOLDOM
DELIVERED THE OPINION OF THE COURT.

This action arises from a collision between the automobiles of the plaintiff and defendant at a street and boulevard intersection, in which plaintiff seeks to recover from defendant the amount of the damages to his automobile resulting from the collision on the contention that the damage suffered was due to the negligent management of defendant's automobile.

The cause was submitted to the court for trial. After the proofs of plaintiff were in defendant made a motion for a finding in its favor, which the court indicated by his remarks he was inclined to grant. Thereupon, and before the court's decision on the motion, plaintiff moved for a non-suit, which the court denied and entered a finding for defendant and a judgment of nil capiat.

Error is assigned and argued on the denial of plaintiff's motion for a non-suit. The denial of the motion was error. Sec. 70, chap. 110, title "Practice", provides that in cases tried, as was this, before the court without a jury, a plaintiff may suffer a non-suit before the case is submitted to the court for final decision; and Sec. 293 of the Municipal Court Act, Murd's ed., provides that "Every person desirous of suffering a non-suit shall be barred therefrom unless he do so before the jury retire from

the bar, or before the court, in case the trial is by the court without a jury, states its finding."

The decision of the motion before the court was not the finding contemplated by the statute. Counsel were not required to anticipate that the court would sustain the motion. This motion was opposed, and if not granted defendant would have been put to its defense. What the statute means by the court's finding is the court's ultimate finding after the cause is submitted by all the parties. So it was held in Draube v. Kuppenheimer, 272 Ill. 350, where a motion for an instructed verdict was made, and before the verdict was signed plaintiff moved for a non-suit, that the motion must be granted, as it was, and the judgment of non-suit was affirmed in both this and the Supreme Court. In Berry v. Savage, 2 Scam. 261, it was held under a similar statute that when the jury had retired to consider of their verdict and afterwards returned into court for further instruction and plaintiff moved for a non-suit before the jury had again retired from the bar of the court, it was reversible error to deny the motion, and the Supreme Court reversed the judgment and entered a judgment of non-suit in the reviewing court.

The evidence is uncontradicted that defendant's driver was when the accident occurred violating a city ordinance which inhibits any vehicle from being driven onto any boulevard without first bringing such vehicle to a full and complete stop. Plaintiff had a right to assume that defendant's driver would in this regard observe the ordinance, and plaintiff cannot be held to have been negligent in acting upon such an assumption. The failure to observe this ordinance was negligence attributable to the defendant which was the proximate cause of the accident.

In these circumstances the trial court was in

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error in holding that the driver of plaintiff's car was guilty of contributory negligence and that the driver of defendant's car was not guilty of negligence.

For not permitting plaintiff to suffer a non-suit, the judgment of the Municipal Court is reversed and the cause is remanded to the Municipal Court with directions to enter a judgment of non-suit.

REVERSED AND REMANDED
WITH DIRECTIONS.

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157 - 23500

PUBLIC AGENCY COMPANY,
a corporation,

Appellant,

vs.

CHARLES KRONAUER,
doing business, etc.,
Appellee.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 L.A. 506

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Public Agency Company brought suit in the Municipal Court against Charles Kronauer on a note executed by him for \$1250.00, dated August 1, 1916, payable to the order of United Service Company six months after date, with interest at 6% per annum. The note bore the endorsements of "A. L. St. George", "Maximilian St. George" and "Pay to Public Agency Co., A. L. St. George."

The defense made by Kronauer to the action is that the note was given without consideration, or that the consideration therefor had failed; that the plaintiff had not received the note in due course and that defendant was legally entitled to make any defense to the action brought on the note that he could have made had suit been brought by the original payee or endorsee of the note. It was shown on trial that the note was given for 10 shares of stock of The Factory Distributing Company and an agreement which provided that The Factory Distributing Company would advertise harness goods manufactured by Kronauer in a catalog issued by it.

The evidence indicates that the sole business of the United Service Company, payee named in the note, was the selling of the Factory Distributing Company's stock, which in turn possessed, as its chief asset, a catalog of doubtful value at the time of the trial.

It will be impossible to indicate here the history and relations of the different corporations involved in the intricate story developed on the trial. It is sufficient to say that we are convinced that The Factory Distributing Company, United Service Company, Public Agency Company, Royal Investment Company and Public Life Insurance Company, were all corporations having little more than a paper value.

The United Service Company was created to act as general agent in the selling of The Factory Distributing Company's stock. It had the exclusive right to sell this stock. H. C. Moore, the so-called "superintendent of agents" of the United Service Company, also agent of The Factory Distributing Company, called upon defendant in May, 1916, and informed him that one St. George had given him Krenauer's name and solicited Krenauer to buy stock in The Factory Distributing Company; that this latter company was a mail order concern, had a catalog and was going to sell direct to farmers and that any orders received by it for harnesses would be transferred to defendant. Other representations were made directly and indirectly to defendant with reference to the value of the stock of The Factory Distributing Company and its relations and business prospects, which, we think, warranted the conclusions of the trial court that the transaction was essentially fraudulent.

When Moore received the note he turned it over to the United Service Company, which in turn endorsed it to Hartung, its Secretary, who delivered it to L. J. St. George, who was general counsel of Public Life Insurance Company and Royal Investment Company. St. George testified that he transferred the note in December, 1916, to his wife, A. L. St. George, who transferred it by endorsement to the plaintiff for certain shares of stock of the Public Life Insurance

Company and Royal Investment Company. St. George testified that in March or April, 1916, he told Hartung, Secretary of the United Service Company, which was selling the stock of The Factory Distributing Company, that if he, Hartung, could interest defendant in the purchase of stock of The Factory Distributing Company, he, St. George, might become interested in that company; that he had never investigated or looked into the United Service Company; that he learned on January 10, 1917, that The Factory Distributing Company was insolvent; that he called Moore on the telephone and inquired about the company and that Moore said to him, "You have just come for the funeral, * * * * the funeral of The Factory Distributing Company. We went up the spout." St. George did not purchase any of the stock of The Factory Distributing Company at the time the note was given, although he says that he did buy five shares some days later. On cross examination he stated that he did not remember whether he had taken 3, 4 or 5 shares and did not know whether he had paid for it.

There is satisfactory evidence in the record to the effect that M. J. St. George never purchased any stock of The Factory Distributing Company; that it issued stock to him on August 7, 1916, the same day that the stock was issued to Kronauer and that The Factory Distributing Company had not received any consideration whatsoever for the stock which was issued to St. George.

The evidence further discloses that St. George caused the transfer of defendant's note to the plaintiff by arrangement with one Clover, its president, and this notwithstanding the fact that St. George admitted on the stand that he had, on a prior date, attempted to cause the indictment of Clover in connection with the affairs of the Royal Life Insurance Company.

M. J. St. George transferred the note in question to his wife, A. L. St. George, who in turn transferred it to the plaintiff for certain shares of stock of the Royal Investment Company and Public Life Insurance Company. The first of these companies was organized in Dakota in November, 1916, and the latter was organized on December 5, 1916. The Royal Investment Company and the Public Life Insurance Company occupied the same office and M. J. St. George was general counsel for both companies at the time he caused the transfer of the note to plaintiff. He was also at the same time attorney for plaintiff.

There is some conflict in the evidence as to whether the stock received for the transfer of the note to plaintiff had any actual value. Clover, who testified for the plaintiff, seems to have a capacity for dealing in large figures and nothing else. His testimony as to the value of the stock which he or his company gave for the note is so extravagant as that the jury might, if it saw fit to do so, disregard it altogether, and in some respects his statements are unbelievable. We think there was sufficient evidence to warrant the jury in finding that the note was procured from the defendant as the result of fraudulent representations as to the value of the stock of The Factory Distributing Company at the time the note was executed and that there has been an entire failure of consideration for the note. We think also that evidence was submitted to the jury which tended to prove that the plaintiff, through its agent, had received the note of defendant with knowledge of this failure of consideration, and, further, that nothing of actual value was in fact given to St. George or his wife for the note and that the whole series of transactions referred to in the evidence was built up for the purpose of

enabling the actual parties to the transaction to obtain payment on the note which was obtained from defendant by fraud.

There can be no possible doubt about the deceitful conduct of the persons who obtained the note from Kronauer, and the trial court was warranted in believing under the evidence that M. J. St. George had full knowledge of all the facts of the transaction and that he was ⁱⁿ all probability a party thereto.

We think the jury were warranted in believing from the evidence that the total assets of the several corporations involved consisted of some office furniture, a telephone, an old catalog, and the privilege which each tacitly allowed to the other of using the corporate names in securing purchasers of stock of the several companies, which never had any real value.

As stated, no attempt has been made to indicate all the evidence heard on the trial. The time of this court should not be taken in unravelling the intricate story of the corporate and individual duplicity which resulted in a delivery of the note to plaintiff.

The delivery of plaintiff's stock to Mrs. St. George in return for plaintiff's note was simply the final step in what the jury were authorized to believe was a conspiracy to defraud defendant from the very beginning. The execution of the note was in a measure due to the insistence of M. J. St. George that defendant be procured to purchase some of The Factory Distributing Company's stock. Clover, president of plaintiff, M. J. St. George, who claims to have purchased the note and who gave his check to Moore, the man who directly imposed the fraud upon defendant, and Hartung, the agent of The Factory Distributing Company, were all, we

think, fully cognizant of the fraud that was practiced upon the defendant.

In Schwarz v. Reznick, 257 Ill. 379, the Supreme Court said:

"Fraud, like all other facts, may be proved by circumstances. We seldom expect to prove it by the admissions of a party and rarely to find direct and positive evidence of the fact. 'Whatever circumstances, when proven, convince the mind that the fraud charged has been perpetrated, is all that is required.'"

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

LOUIS SMITH,
Plaintiff in Error,

vs.

SANITARY DISTRICT OF CHICAGO,
Defendant in Error.

ERROR TO MUNICIPAL COURT
OF CHICAGO.

209 T.A. 507

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is a writ of error to reverse a judgment entered in the Municipal Court in favor of defendant, Sanitary District of Chicago.

Plaintiff brought suit to recover damages arising from injuries to plaintiff's automobile which he asserts was caused by an effort to avoid a collision with an automobile owned by defendant, Sanitary District of Chicago, and in the control of one of its servants. The trial was had before the court without a jury and finding and judgment were in favor of the defendant.

It appears from the evidence introduced on the trial that on July 9, 1914, plaintiff's son was driving an auto truck south on the west side of Western avenue a short distance north of what was called on the trial Sanitary District Driveway, which intersects Western avenue at right angles. One Gallagher was driving an automobile touring car for defendant in the driveway in an easterly direction and toward Western avenue.

There is a dispute in the evidence as to what happened at and just before the accident which caused the injuries to plaintiff's car. Frank Smith, plaintiff's son, was driving plaintiff's automobile at the time of the accident. He testified in substance that as he approached the driveway along which defendant's employee was driving, he,

the witness, saw defendant's automobile coming out of the driveway; that the driver of this automobile gave witness a signal to go ahead; that he, the witness, increased the speed of his car and attempted to turn easterly in front of defendant's automobile, which was then entering Western avenue; that in order to avoid a collision with defendant's car the witness was compelled to drive his car into a brick wall erected on the east side of Western avenue.

It is fairly inferable from an examination of all the evidence heard on the trial that as the drivers of the cars in question approached each other on Western avenue each attempted to turn out to avoid a collision. As the cars approached each other the plaintiff's son, in an effort to avoid a collision, drove almost directly east across Western avenue and into the brick wall. The driver of defendant's car, evidently in a like effort to avoid an accident, also drove in an easterly direction across Western avenue and before his car reached the wall he turned south and avoided any accident or injury to his car.

George Gallagher, the driver of defendant's car, testified that he first noticed plaintiff's truck as it approached him when it was about 250 feet south of the driveway; that when plaintiff's truck was about 200 feet away he saw a man in the truck make a motion to "put on the brakes and stop"; that as the witness was about to drive his car into Western avenue he "noticed him almost on top of me," and that he, the witness, then increased the speed of his car and turned south. This witness denied that he gave any signal to the driver of plaintiff's car to proceed south on Western avenue.

On material points there is a direct contradiction

in the evidence. There was some evidence to the effect that plaintiff's car was moving on a down grade at a rate of 20 miles an hour just before it reached the driveway, and if this be true it is not surprising that plaintiff's driver was unable to stop his car before it crashed into the wall on the east side of the street.

There is some inherent improbability in the story told by plaintiff's witness. It does not seem reasonable that if his car was going slowly, as he says it was, at the time he approached the driveway, that it was at all necessary for him to so accelerate its speed in turning to the east as to cause the damage which it is claimed the car sustained. But however this may be, we think the questions of negligence or lack of negligence of both plaintiff's driver and the driver of defendant's car were questions of fact for the determination of the trial court. There is sufficient evidence in the record upon which to base the conclusion which the trial court evidently reached as to the conduct of the parties involved in the accident, and even though it may be assumed that defendant's employee was in some degree guilty of negligence, there is in the evidence ample support for the contention that plaintiff's servant was guilty of negligent conduct in the control and operation of the car which he was driving which proximately contributed to cause the accident. We do not think the evidence introduced on the trial preponderates so greatly in favor of the contention of the plaintiff as to warrant a reversal of the judgment.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

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pregnancy of an unmarried woman.

It is insisted on behalf of defendant that the verdict of the jury was invalid in that it varied from the allegations of the complaint that was originally filed in the cause. That complaint charged that Relatrix, at the time the complaint was filed, was "an unmarried female and pregnant with child." The verdict of the jury was to the effect that the Relatrix, "an unmarried female, was, on the 15th day of March, 1917, delivered of a female bastard child." The complaint was filed December 1, 1916.

We do not believe that the court erred in permitting the prosecution to amend the complaint after the verdict of the jury was entered. The gravamen of the offense charged was that the defendant was the father of a child which when born would become a bastard. The event which the trial court thought authorized the filing of an amendment to the complaint occurred after the original complaint was filed. The original complaint did not misstate the facts as they then were, and it is obvious from the nature of the proceedings that to deny the right of amendment as claimed by the prosecution would seriously interfere with effective prosecution under the Act.

The statute authorizes the court, where complaint is made, as was originally done in the present case, to continue the cause until after the birth of the child. While it may have become the practice, as stated, to permit amendments in bastardy cases after verdict and before judgment, as was done in the case at bar, we are not at all certain that such practice is necessary.

The prosecution against the defendant is in its nature a civil proceeding, and the information or complaint was, under Section 39 of the Practice Act, amendable at any

time before final judgment.

In Long v. People, 135 Ill. on page 441, the Supreme Court quoted with approval Bishop on Criminal Procedure as follows:

"In matters of amendments, the information stands on entirely different grounds from an indictment. The public officer by whom the information is presented being always present in court, it may be amended, on his application, to any extent which the judge deems to be consistent with the orderly conduct of judicial business, with the public interest, and with private rights."

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

267 - 23612

JAMES H. HOOPER,
Appellee,

vs.

O. C. HAGEN,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 515

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

The defendant, O. C. Hagen, appeals from a judgment of the Municipal Court against him and in favor of the plaintiff, James H. Hooper, for the sum of \$89.00.

The controversy between the parties arises out of a contract for the sale of the premises at 1955 Jackson boulevard, Chicago. Marguerite C. Hurter, a stenographer in the office of the defendant, by written contract agreed to convey the premises in question to Nina Tillman. On June 10, 1916, Nina Tillman assigned her interest in the contract to the plaintiff. On June 23, 1916, the deal for the sale of the premises was closed and by direction of plaintiff a deed was executed by Frederick J. Phillips, who held the legal title to the premises, to Louis Heidlauf.

It seems that the parties to the transaction agreed to make adjustments of the rents, insurances, etc., as of June 13, 1915.

Plaintiff insists that at the time the deal for the sale of the premises was closed Hagen, the defendant, agreed to procure for plaintiff orders upon the tenants in possession of the premises to pay the rents due and to accrue to the plaintiff; that the defendant had failed to deliver the orders to plaintiff; that as a result of such failure the plaintiff had been unable to collect rents due from

tenants in possession of the property for the month of June, 1916.

We do not think there is much merit in the contentions made by defendant that the plaintiff had no such legal interest in the premises, and the rents issuing therefrom, as would enable him to bring an action for the failure of defendant to comply with his agreement to deliver the orders in question to plaintiff and that defendant's promise was purely gratuitous.

It is true, as urged, that the plaintiff had directed that the deed be made to run to Louis Heidlauf; notwithstanding this fact it is clear from the evidence that the defendant and the plaintiff dealt with each other as parties having an actual interest in the premises. Indeed, the plaintiff testified that Hagen said to him that he was the owner of the premises and that plaintiff knew nothing of Phillips' connection therewith until a short time before the deal was closed. While the defendant says that Phillips was the real owner of the property at the time of its sale, he does admit that as a result of an arrangement with Phillips to take title to other property, not in question, the purchase price for the premises conveyed to Heidlauf in fact went to the defendant.

There is evidence in the record in support of the contention that both plaintiff and defendant had such interest in the premises at and after the contract was entered into as would furnish a sufficient legal consideration for the promise of defendant to deliver to plaintiff the orders in question.

The only witnesses heard upon the trial were plaintiff and defendant, who contradict each other in important particulars. We are not in a position to say that the conclusion of the trial Judge as to these matters was er-

aneous. Plaintiff urges that he is entitled to receive the full amount of the rents due for the month of June, 1916, less \$14 which he concedes was properly deducted for janitor services. The plaintiff had a legal right to demand of the tenants that they pay the rents to him or his assignee. In the event of their refusal he could have sued them on their promise to pay the rent. However, the rents were not payable in advance; the rents for the month of June were due and payable at the end of that month. Plaintiff had ample opportunity to collect the rents for the month, or to protect himself by tendering notice to the tenants of the change of title to the premises. Plaintiff testified that the tenants refused to pay the rent. The mere refusal of the tenants to pay the rent would not be sufficient basis to award damages to plaintiff, if it be conceded that he is entitled to recover on the alleged promise of defendant.

At the time the deal was closed the vendor was credited with the sum of \$42.90, being rent for the premises for 13 days at the rate of \$99 per month. So far as plaintiff's right to the rents accruing after June 13th is concerned, it is our opinion that he could by proper steps have protected his interests. We think, however, that plaintiff is fairly entitled to the \$42.90 deducted by the defendant out of the purchase price paid by plaintiff. It is not denied in the evidence that the tenants refused to pay all of the June rent to plaintiff; and if it be true that defendant, in violation of his promise, had failed to deliver the orders to plaintiff, he, plaintiff, was not legally in a position to enforce payment of rent for the use of the premises during a period of time before the delivery of the deed, and as the trial court evidently was of the opinion that the real party in interest in the premises which were sold was the defendant, and not

Phillips, we think the defendant should be required to pay to plaintiff the sum of \$42.90 less the \$14.00 which plaintiff concedes should be allowed on account of janitor service.

The judgment of the Municipal Court will be reversed and judgment entered here in favor of the plaintiff for the sum of \$28.90 with costs in this court in favor of the defendant.

✓
REVERSED AND JUDGMENT HERE IN FAVOR
OF THE PLAINTIFF FOR THE SUM OF
\$28.90.

PHILIP GOLLNER COMPANY,
a corporation,
Appellant,
vs.
DAVID D. HEPBURN et al.,
Appellees.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

209 I.A. 525

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff from a judgment of the Municipal Court of Chicago in favor of defendant. Plaintiff, a sub-contractor, brought suit against the defendants David D. Hepburn and Elizabeth Hepburn to enforce a lien in its favor under Section 21, Chapter 82, of the Revised Statutes. Plaintiff, under a contract which it had entered into with Alden J. Baumgartner, a contractor, during the year of 1916, furnished and delivered to premises owned by defendants certain plumbing and gas fitting materials.

The chief question in dispute between the parties is as to whether the plaintiff, a sub-contractor, had served the defendants with written notice of his claim and the amount due or to become due it within 60 days from the date of the last delivery of material, as required by the statutes. The evidence introduced on the trial shows that the plaintiff delivered practically all of the materials ordered by Baumgartner to the premises owned by defendants on or before June 27, 1916. Plaintiff's agent served the written notice of lien claim upon the 29th day of August, 1916, 63 days after the delivery of the materials to the premises on June 27, 1916. It is insisted, however, on behalf of plaintiff that all of the materials furnished by

plaintiff to Baumgartner, the sub-contractor, were not delivered to the premises owned by defendant on or before June 27, 1916; that thereafter on July 10, 1916, the plaintiff had delivered to the premises a water closet seat. Whether the delivery of this article was made to the premises was the principal question of fact determined by the trial court. Baumgartner, the contractor, who testified for the plaintiff, stated that the seat was delivered to his, witness', home and that it was not placed in the premises owned by defendants; that the witness had used this seat on another job and that he had delivered another seat to defendants. This testimony is directly disputed by that of a witness for plaintiff. There is a direct contradiction in this testimony and we are unable to say that the trial court erred in its evident conclusion that the water closet seat was not in fact delivered to the premises owned by defendants.

There is ample evidence in support of the contention that the lien notice was served more than 60 days after the last delivery of material to the defendants' premises.

Plaintiff began his suit November 15, 1916. It does not appear from the statement of claim filed by it when the materials which were furnished on Baumgartner's order were to be paid for. In such circumstances the presumption is that payment for the material was due on delivery thereof. The lien statute requires suit to enforce a lien to be begun within 4 months after final payment is due the sub-contractor. While a witness for plaintiff testified that plaintiff had an oral arrangement with Baumgartner under which he, Baumgartner, was to pay for the materials within 60 days after delivery, this fact is omitted in the statement of claim.

It has been held in numerous cases that the right to a lien is a privilege bestowed by the statutes upon a particular class of persons, and that such right will be denied in every case where a person claiming under the statutes has failed to bring himself within its terms. Ryerson & Son v. Smith, 152 Ill. 645.

In view of the foregoing we do not deem it necessary to discuss other questions presented in the briefs of counsel.

The judgment of the Municipal Court will be affirmed.

AFFIRMED.

JACOB GOODMAN,
Appellee,

vs.

ABE SMITH and ISADORE
MERELVITCH,
Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

20971526

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Municipal Court in favor of plaintiff and against defendants for the sum of \$1,665.

In a statement of claim filed by plaintiff it is alleged that there is due plaintiff the sum of \$1,725 commission as real estate broker for negotiating a sale of real estate owned by defendants. In an affidavit of merits filed by defendants it is alleged that the plaintiff was not a duly licensed real estate broker and that he was not the procuring cause of the sale of the property in question. The case was tried before a jury. The verdict of the jury was for \$1,914.75. After its return the court permitted the plaintiff to file an amended statement of claim and the plaintiff filed a remittitur of \$249.75 from the amount of the verdict.

Plaintiff testified that in August, 1913, he introduced one Dr. Cannon, a prospective purchaser of defendants' premises, to defendants, and that at the time he did so plaintiff and defendants verbally agreed that defendants would pay plaintiff for his services, in the event of a sale of the property, the sum of \$1,725, being 2½% of the purchase price at which defendants proposed to sell the premises; that further negotiations were had between Dr. Cannon and defendants for a period of over three

weeks following this first conversation.

On the 8th day of September, 1913, Dr. Cannon employed Rissman Brothers, licensed real estate brokers, to aid him in negotiating the deal, and on the day following Dr. Cannon and defendants entered into a contract for the sale of the premises.

There is also evidence in the record to the effect that the plaintiff following the date of the contract received the sum of \$60 at the office of Rissman Brothers for which he signed an instrument as follows:

"Chicago, Sep. 9th, 1913.
I here by relece my right from commisin and
- Services on the S. E. C. Duglas and Milard Ave.
J. Goodman."

The defendants denied that they promised to pay any commission or any sum of money to plaintiff; that they had insisted that before they would close a contract for the sale of the premises a release would have to be obtained from Goodman and one Newlander of any claims which they might have against defendants. Newlander received \$120 for such services as he rendered in connection with the sale of the property. Plaintiff insists, however, that he offered to return the \$60 check received by him, and on the trial he asserts that he signed the above instrument in blank. The check in fact was not returned and it was thereafter cashed by plaintiff. Rissman Brothers received \$850 in full for their commission for negotiating the sale.

Passing the question of whether the plaintiff had under the law any legal right to recover commissions as a real estate broker against defendants, we think, under the circumstances shown to exist by the evidence, that the plaintiff must be held to have accepted the \$60 paid to him in full release of his claim against defendants. From the

evidence it is clear that the plaintiff had refused to close the contract for the sale of the premises until protected from any claims for commissions or services that might be made by either the plaintiff or Newlander. The consummation of the sale was the immediate result of the enlistment of the services of Rissman Brothers. The plaintiff, it is true, had endeavored to sell the property to Dr. Cannon, and being unable to do so, Rissman Brothers were called into the transaction and they succeeded in consummating the sale. It is evident from the whole record that at the time defendants executed the contract for the sale of the property they were concerned as to whom they would be required to pay commissions.

The plaintiff accepted the \$60 in payment and signed the instrument referred to. He testified in substance that he had signed the instrument in blank. A similar release on the same sheet was executed by Newlander, who received \$120, and while it is asserted that plaintiff's signature to the document was obtained by fraud, we think the evidence introduced in connection with its execution and the alleged tender back of the \$60 shows without much doubt that the plaintiff accepted this money in payment of such services as he had rendered in connection with the sale of the premises.

It is also asserted that the instrument, which we think the evidence shows was executed by the plaintiff, does not constitute a release. It is not denied that the property in question was located at the southeast corner of Douglas and Millard avenues. In the instrument he expressly releases his right to "commisin and Services" and while the instrument is crudely drawn, we think that the defendant by use of the language "my right from commisin and Services"

intended to release all his claims against the parties to the transaction in question.

There is inherent improbability in the testimony offered for the plaintiff. In his testimony he says that defendants agreed expressly to pay him the sum of \$1,725; that is $2\frac{1}{2}\%$ upon the \$73,000, the price which defendants were asking for the premises. The property was sold for \$69,000, and the amount for which plaintiff was given judgment is $2\frac{1}{2}\%$ of that sum.

With reference to the payment of the \$60 to plaintiff and the execution of the release, plaintiff's own testimony is unbelievable. He was a real estate agent of much experience, and in connection with the signing of the release he testified as follows:

"Q And he (Samuel Rissman) asked you to sign a certain instrument, that is, a letterhead, a blank piece of paper?

A Yes.

Q Just passed it to you and asked you to sign your name on it?

A Yes.

Q And you did sign your name on it? A Yes.

Q And he told you he would pay you some money to put your name on that instrument?

A Yes, if I am game enough to do it.

Q You didn't ask him any reason?

A Certainly, I asked him. He said, you are a sport. That goes with me.

Q He said, you are a sport, and gave you money for it?

A I got \$60.00 for it.

Q All he did after you got into his office was to pass a paper before you and ask you to sign your name?

A Yes.

Q That is all he said to you, is that correct?

A Yes."

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Other questions are discussed in the briefs filed by counsel, which, in view of the foregoing, we will not discuss. The validity of plaintiff's claim against the defendant, even if no release had been executed, would have been doubtful. It is far from certain that he was the procuring cause of the sale of the premises, but in any event he must be held to be bound by the release which the evidence shows was executed by him.

The judgment of the Municipal Court will be reversed with a finding of facts.

REVERSED WITH A FINDING OF FACTS.

FINDING OF FACTS.

The court finds as ultimate facts, first, that plaintiff was not the procuring cause of the sale referred to in his statement of claim, and, second, that plaintiff was paid for all services rendered by him in the matter and executed and delivered a release in writing therefor.

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description of the work done during the year.

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description of the work done during the year.

3. The third part of the report is devoted to a detailed

MANDEL BROTHERS, a corporation,
Appellee,

vs.

ALFON E. BAHR and MRS. ALFON
E. BAHR,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

209 1A 527

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an undefended appeal from a judgment of the Municipal Court in favor of the plaintiff. It is insisted on behalf of defendants that the evidence heard upon the trial does not sustain the finding and judgment of the court.

While witnesses for plaintiff testify that plaintiff, who operates a large department store in Chicago, does not send goods to its customers on approval, we think the evidence satisfactorily shows that the coat in question was in fact delivered to defendants on approval. The garment was delivered to defendant Mrs. Bahr at her residence on Saturday, and on the Monday following the plaintiff's agent called for the coat and returned it to the plaintiff.

One witness, testifying for plaintiff, stated that when plaintiff received the coat from defendants it was in a soiled and damaged condition. We think this evidence, however, is not sufficient to overcome that of four witnesses who testified in positive terms that the coat was in perfect condition when delivered by defendant Mrs. Bahr to the plaintiff.

The judgment of the Municipal Court will be reversed and judgment of nil capiat entered in this court.

REVERSED AND JUDGMENT HERE.

AMY R. SULLIVAN,
Appellee,

vs.

JOHN J. SULLIVAN,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

209 LA 128

MR. JUSTICE DYER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Superior Court of Cook County in favor of complainant, Amy R. Sullivan.

In her bill of complaint the complainant alleged that she was living separate and apart from her husband without fault on her part; that the child of complainant and defendant was living with her, and complainant prayed for the custody of this child. In an answer filed by defendant he denied that he had deserted or had refused to live with and support complainant; that he had treated her cruelly or had otherwise mistreated her. The parties were married on the 14th day of November, 1900, and continued to live together for a period of about 14 years.

We think there is sufficient evidence in the record to support the conclusions reached by the chancellor. The decree awarding separate maintenance to complainant requires defendant to pay \$10 a week for the support and maintenance of complainant and her child. Complainant testified that at the time of the separation of the parties in 1914 the defendant was in the saloon business; that his name was printed over the door of the saloon, and that subsequently his brother came into the business; that at an earlier date defendant had operated another saloon in Chi-

cago; that during the time defendant was in the saloon business he had paid complainant \$17 and \$18 a week for household expenses; that defendant had left her without reason therefor; that a week after he left her he sent her \$7.00; that she communicated with him by telephone some days after he left her and asked him to come home.

Testifying in his own behalf the defendant said that his largest income at any time was \$100 a month; that he did not own or operate the saloon in question; that he was employed by his brother as a bartender; that he had formerly received as such a salary of \$16 and \$20 a week; that his income at the time of the trial was \$15 a week; that the complainant had without his knowledge or consent moved the family furniture to Augusta street.

It is apparent from the evidence that there was not much harmony between defendant and his wife for some time prior to the separation and that their marital relations were far from pleasant. While she charges him in her bill with cruelty and other wrongful conduct, the evidence does not sustain the more serious of these charges. Whatever may have caused the disagreement between the parties, it is clear from the evidence that the defendant had refused to live with complainant, and there was much evidence heard which tended to prove that he had finally concluded to desert her and her child. On the whole evidence we are unable to say that the chancellor was wrong in his finding that the complainant was living separate and apart from her husband without fault on her part.

It is also asserted that the decree for alimony of \$10 a week in favor of the complainant is excessive. There is some dispute in the evidence as to the earning powers of defendant and as to his actual income during the time

that he lived with complainant and thereafter. He denies that he operated a saloon and asserts that in recent years, while in the employ of his brother, his salary had been reduced. Complainant testified as to the amount which he had actually given her for household expenses during the time they lived together, and that defendant was in fact the owner of the saloon. On the evidence, the chancellor in the exercise of sound discretion was authorized to fix the amount which defendant should pay to support his wife and child, and we cannot say from our examination of this record that the amount fixed in the decree is excessive.

The decree of the Superior Court will be affirmed.

AFFIRMED.

THE GLOBE WERNICKE COMPANY,
a corporation, etc.,
Appellee,

vs.

SIEGEL MYERS SCHOOL OF MUSIC,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

209 1A 529

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

Siegel Myers School of Music, a corporation, being in financial difficulties, on July 9, 1913, entered into a composition or trust agreement with its creditors. This agreement provided that creditors of the corporation, through the appointment of a trustee, to be selected by them, were to be placed in control and management of the business and property of the corporation. The creditors, officers and stockholders of the corporation and F. H. Kastor, the trustee selected by the creditors, agreed that the corporation was to be given an extension of time to pay its obligations to the creditors "so long as the business of said corporation is conducted pursuant to the terms of this agreement as hereinafter provided and to receive payment hereof proportionately in such manner as shall be directed ^{by the} trustee." The trustee was given discretionary power to manage the business of the corporation for the purpose of securing to the creditors payment of their debts. In order to aid in the performance of the trust agreement a majority of the stock of the corporation was transferred to the trustee and he was given full power to use and vote the same as he might elect. It was provided in the trust agreement that the directors of the corporation would resign and that the trustee might, for the purpose of

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3. The third part of the paper is devoted to a discussion of the question of the influence of the external electric field on the structure of the atom.

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12. In the twelfth part, we shall consider the question of the influence of the external magnetic field on the structure of the atom.

giving him full control of the corporate affairs, elect their successors. The trustee was given power to call meetings of the creditors to advise him in relation to the trust.

It was also provided in the agreement that after payment of the expenses of the trust dividends were to be paid to the creditors as follows:

10%	on or before	6 months
20%	" " "	9 "
70%	" " "	12 "

and that "upon default in such payments the agreement shall expire unless the creditors make other provision."

It is not denied that the plaintiff was a party to this trust agreement. The trustee paid to the creditors, during the first year of the trust, dividends amounting to 25% of the indebtedness of defendant. At a meeting of more than a majority in number and amount of the creditors, held June 22, 1914, a resolution was passed extending the trust agreement until November 9, 1915. The unpaid dividends provided for by the original agreement were passed and the resolution provided that defendants were to be paid "as near as may be" 10% November 1, 1914, 10% April 1, 1915, 10% July 1, 1915, and 45% in November, 1915, and that future meetings of creditors might be called to take such action in relation to the trust estate as might be supported by a majority of the creditors who had "subscribed to the original agreement."

At a meeting of the creditors held October 16, 1915, the trustee reported that in his judgment dividends could thereafter be paid to the creditors at the rate of 2% per month, beginning November 15, 1915. At this meeting the trustee was voted \$500 to be paid in installments for his services. A resolution was adopted at this meeting which

provided among other things that it was for the best interest of the creditors that the original trust agreement should be extended until November 9, 1916. This last resolution provided that payment of dividends required by the resolution of June 24, 1914, should be passed and that the trustee be authorized to pay dividends thereafter "as near as may be" 2% November 15, 1915, and 2% each month thereafter. Plaintiff was represented at this meeting by proxy.

Two dividends were paid to the creditors by the trustee after the adoption of the resolution of October 16, 1915; one of 2% on November 15, 1915, and one of 2% in January, 1916. In all, the original claim of plaintiff has been reduced by dividends paid from the sum of \$549.67 to \$391.57. Judgment was entered by the Municipal Court of Chicago in favor of the plaintiff for the latter sum, and the defendant has appealed the case to this court for review.

The plaintiff seeks to sustain his judgment by the contention that the last extension agreement of October 16, 1915, was never carried out, and that the trustee, Pastor, who held plaintiff's proxy had, by use of proxies held by him, voted to himself a gratuity of \$500.

It may be conceded, as urged by counsel for plaintiff that a composition agreement must, under the law, be strictly and punctually enforced and that creditors, parties thereto, on their part should carry out such agreements with the greatest good faith. McMannomy v. C. D. & V. R. R. Co., 167 Ill. 497. It is not contended here, however, that the creditors have been derelict in the performance of their agreement. The defendant here is the debtor corporation, which turned over all of its assets and corporate affairs to the control and management of the trustee, who was selected by the creditors. It is not contended that the

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• *Journal of the American Academy of Child and Adolescent Psychiatry* 45:10 (October 2006): 1299-1306

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1. *Chrysomelids* 2. *Curculionids* 3. *Chrysomelids* 4. *Chrysomelids* 5. *Chrysomelids* 6. *Chrysomelids* 7. *Chrysomelids* 8. *Chrysomelids* 9. *Chrysomelids* 10. *Chrysomelids* 11. *Chrysomelids* 12. *Chrysomelids* 13. *Chrysomelids* 14. *Chrysomelids* 15. *Chrysomelids* 16. *Chrysomelids* 17. *Chrysomelids* 18. *Chrysomelids* 19. *Chrysomelids* 20. *Chrysomelids* 21. *Chrysomelids* 22. *Chrysomelids* 23. *Chrysomelids* 24. *Chrysomelids* 25. *Chrysomelids* 26. *Chrysomelids* 27. *Chrysomelids* 28. *Chrysomelids* 29. *Chrysomelids* 30. *Chrysomelids* 31. *Chrysomelids* 32. *Chrysomelids* 33. *Chrysomelids* 34. *Chrysomelids* 35. *Chrysomelids* 36. *Chrysomelids* 37. *Chrysomelids* 38. *Chrysomelids* 39. *Chrysomelids* 40. *Chrysomelids* 41. *Chrysomelids* 42. *Chrysomelids* 43. *Chrysomelids* 44. *Chrysomelids* 45. *Chrysomelids* 46. *Chrysomelids* 47. *Chrysomelids* 48. *Chrysomelids* 49. *Chrysomelids* 50. *Chrysomelids* 51. *Chrysomelids* 52. *Chrysomelids* 53. *Chrysomelids* 54. *Chrysomelids* 55. *Chrysomelids* 56. *Chrysomelids* 57. *Chrysomelids* 58. *Chrysomelids* 59. *Chrysomelids* 60. *Chrysomelids* 61. *Chrysomelids* 62. *Chrysomelids* 63. *Chrysomelids* 64. *Chrysomelids* 65. *Chrysomelids* 66. *Chrysomelids* 67. *Chrysomelids* 68. *Chrysomelids* 69. *Chrysomelids* 70. *Chrysomelids* 71. *Chrysomelids* 72. *Chrysomelids* 73. *Chrysomelids* 74. *Chrysomelids* 75. *Chrysomelids* 76. *Chrysomelids* 77. *Chrysomelids* 78. *Chrysomelids* 79. *Chrysomelids* 80. *Chrysomelids* 81. *Chrysomelids* 82. *Chrysomelids* 83. *Chrysomelids* 84. *Chrysomelids* 85. *Chrysomelids* 86. *Chrysomelids* 87. *Chrysomelids* 88. *Chrysomelids* 89. *Chrysomelids* 90. *Chrysomelids* 91. *Chrysomelids* 92. *Chrysomelids* 93. *Chrysomelids* 94. *Chrysomelids* 95. *Chrysomelids* 96. *Chrysomelids* 97. *Chrysomelids* 98. *Chrysomelids* 99. *Chrysomelids* 100. *Chrysomelids*

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61. 2. 56.

debtor is in any manner in default of its agreement. Indeed, its control over its business and property ceased at the time that the original trust agreement was executed. At the time suit was begun it had nothing whatsoever to do in the management of its affairs. It was, of course, interested in a faithful and efficient administration of the trust to the end that it might as expeditiously as possible be released of its indebtedness and restored to the possession of its property and business. Pending this, however, it had merely a passive interest in the trust estate.

It is now well settled law that where several creditors agree with a debtor to extend the time for the payment of the debtor's obligations to them the promise of each creditor to the others constitutes a sufficient consideration to support the promise of each creditor, and that under such circumstances and where the agreement is carried out in good faith, a creditor is barred from bringing an action on his original claim against the debtor pending the composition agreement. National Time Recording Co. v. Feynel, 93 Ill. App. 170.

"Corpus Juris, Vol. 12, page 273.

Arrangements of this nature are of frequent occurrence and of the greatest practical importance especially in financial circles. The peace and tranquillity of the whole commercial world or of great numbers in it * * * are to a great extent dependent upon the finality and validity of such settlement. * * * Hence it is that the law is not indifferent to them but guards and upholds them with a solicitude and watchfulness proportionate to the evils which must follow if it were otherwise, or if they are easily to be set aside or broken up and abandoned for slight or trivial causes. * * * Such are the constituent elements and essential qualities of them that they must bind all and conclude all the creditors joining in their execution or they will bind and conclude none. If one creditor is permitted to go behind and disregard the agreement, every other might have the same privilege."

Johnson v. Parker, 34 Wis. 596.

Counsel in support of their position that the

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composition agreement must be strictly performed by the parties thereto, rely, in part, upon the case of Braude v. Vehon, 201 Ill. App. 486. That case is widely different in its essential facts from the case at bar. In the Braude case a creditor sued the debtor notwithstanding the existence of a composition agreement between the creditors and the debtor, and it was held that in that the defendant had not made payment within the time fixed by the agreement, the right of action on the original debt revived. There is no claim made here that the debtor is in any manner in default. The argument is that the trustee, who was a trustee for all the creditors, including plaintiff, had failed to comply with the directions contained in a resolution adopted by the creditors on October 16, 1915.

When the original trust agreement and the extensions thereof are construed together and when consideration is given to the parties thereto, and the relation which Kastor, the trustee, bore to all of the parties, it becomes clear that the payments directed by the extension resolutions were not intended to constitute a contract binding upon the trustee, the creditors, or even the debtor. The agreement in effect provided that the dividends were to be paid out of the profits of the business, and this necessarily implied that the payments were to be made only in the event that the trustee would be able to procure sufficient profits out of his operation of the business to make the payments. Being unable, as he was, to make all of the payments provided by the original agreement, the creditors, among whom was the plaintiff, thought it advisable to extend the agreement, and this was done under the express authority of the original agreement, to which the debtor was a party. The proposition to pay 2% a month came from the plaintiff and the other

creditors. The defendant, by joining in the original agreement, merely left it to the discretion of the creditors to determine what and when payments were to be made, if at all, in the reduction of their claims against it. The resolutions provided for dividend payments "as near as may be" at specified rates and times. The language of the resolutions did not, we think, impose upon defendant the obligation of making such payments; the direction was to the trustee, and, as hereinbefore stated, the duty imposed upon him depended for its fulfillment upon his ability to acquire sufficient profits out of the business to make the payments.

When the creditors became a party to the original agreement, and when the defendant had conveyed its property to a trustee selected by them, they, the creditors including the plaintiff, became bound by the trust agreement. Condict v. Flower, 106 Ill. 105.

"To allow a creditor after he has entered into such an agreement upon which all the others have acted, to repudiate his contract and sue for the entire amount of his original debt would be sanctioning the perpetration of a fraud upon those who surrendered a portion of their demands for the common benefit." Stewart v. Langston, 103 Ga. 290.

The plaintiff seems to have concurred in the action taken by the creditors and the trustee for a period of about three years, during which time 29% of the amount originally due the plaintiff was paid; he is, under the circumstances, estopped to bring suit against the debtor in disregard of the trust agreement.

"The reason for upholding such an agreement is that the rights and interest of other parties become involved in the arrangement, and this affords a new and legal consideration for the promise. It would be contrary to good faith for a creditor who has secured the advantage of such an arrangement to disregard its obligation by proceeding to enforce the balance of his demand; and the debtor is entitled to avail himself of this consideration in defense." Perkins v. Lockwood, 100 Mass. 249.

By force of the resolution of October 16, 1915, the trust agreement was continued in force until November 9, 1915. Suit was begun by the plaintiff before the termination of this agreement on November 9, 1916. We think there is much merit in the suggestion that the suit was prematurely brought. Bacon v. Schepflin, 185 Ill. 122.

There is not great force in the argument that because the creditors had agreed to pay the trustee the sum of \$500 for his services, the agreement to extend the time for the payment of defendant's debts should be invalidated. Whether this action was the result of the possession by the trustee of sufficient proxies to enable him to vote the payment to himself is not important. Whether he acted fairly or otherwise he was in a sense the agent of the creditors and was directly under their control, and it is evident that the creditors could have set aside this payment at any time had they seen fit to do so. On the other hand the debtor retained no control whatsoever over the conduct of the trustee. In any event it does not appear that the plaintiff raised this point for several months after the resolution was adopted and after it had received and retained two dividends which were paid under the last resolution.

The judgment of the Municipal Court will be reversed and the cause remanded with directions to dismiss the suit.

REVERSED AND REMANDED
WITH DIRECTIONS.

585 - 23930

MARIA A. LARSON,
Appellee,

vs.

CHICAGO CITY RAILWAY COMPANY,
Appellant.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

209 I.A. 531

MR. JUSTICE DEVER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the Circuit Court in favor of plaintiff and against defendant for the sum of \$1,000.

In the declaration filed by her the plaintiff alleged in substance that she was a passenger on a street car in the control of defendant and that as she attempted to alight therefrom "defendant carelessly, wrongfully and negligently stopped said car as a point on said 63rd street and to-wit, near the intersection of Union avenue where it was dangerous and unsafe for the plaintiff to alight therefrom, by reason of certain holes and excavations existing in the street there and extending underneath the step of said car, all of which defendant had notice of."

The sole contention of counsel for defendant is that the verdict of the jury is against the manifest weight of the evidence. We think there was ample testimony introduced upon the trial of the case in support of the allegation of the declaration upon which the plaintiff relies.

The accident occurred in the city of Chicago about 10 o'clock in the forenoon of August 28, 1912, on 63rd street, an east and west street, at a point a short distance west of Union Avenue, which runs north and south. Plaintiff, 54

years of age, attempted to alight from the street car at this point. The evidence in the record tends to show that the defendant's tracks at and near the scene of the accident had been under process of reconstruction, and certain of defendant's witnesses say that this work was completed on July 10, 1912. Witnesses for the plaintiff testify that there was an excavation or hole along the track at the point where the plaintiff attempted to alight from the car and that plaintiff when she alighted stepped into this hole and sustained the injuries she complains of. One of these witnesses, Vollman, testified "the tracks were torn up; the bricks were out of the track; that is, I mean, the stones; I am sure of that; I observed that there that morning." One Falk testified that he was attracted to the scene of the accident by a crowd which had collected; that the street was torn up between the tracks and outside of the tracks for about 15 to 8 inches; the hole being 6 to 8 inches deep; that it extended 4 or 5 inches beyond the step of the car. At least eight other witnesses testified for the plaintiff as to the condition of the street and tracks at the point in question, and their testimony strongly corroborates that given by the plaintiff and other witnesses. On the other hand, the testimony of a number of witnesses, testifying for defendant, tended to prove that on July 10, 1912, and up to and including the day of the accident, the street at the point where plaintiff alighted was in good and safe condition. Under such circumstances we are not permitted to interfere with the verdict of the jury and the judgment of the trial court.

An examination of the record discloses that the contentions of counsel for plaintiff are strongly supported by the evidence introduced in her behalf, and while this

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1. *Journal of the American Medical Association*, 1990; 263: 1025-1028.

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evidence is contradicted by witnesses for defendant, the case is clearly one for determination by the jury and the trial judge, who had an opportunity to hear and observe the witnesses and to determine their credibility.

In Illinois Central Railroad Co. v. Gillis, 68

Ill. 317, the Supreme Court said:

"If any rule of this court can be so well established as to be neither questioned nor require the citation of authority to support it, it is that a verdict will not be set aside whenever there is a contrariety of evidence, and the facts and circumstances, by a fair and reasonable intendment, will authorize the verdict, notwithstanding it may appear to be against the strength and weight of the testimony."

The judgment of the Circuit Court will be affirmed.

AFFIRMED.

COLONIAL TRUST & SAVINGS
BANK, a corporation,
Appellee,

vs.

SANDOVAL ZINC COMPANY,
a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 I.A. 532

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of \$850 had by plaintiff, Colonial Trust & Savings Bank, against the defendant, Sandoval Zinc Company, in an action on the following note:

"\$750.00

Chicago, June 15, 1914.

Ninety days after date for value received, we promise to pay to the order of B. F. Straus the sum of Seven Hundred Fifty Dollars at No. 410 N. Peoria St. Value received. With interest at the rate of per cent. per annum.

Sandoval Zinc Co.,
Sandoval Zinc Co.,
W. Weill, Pt."

The defense pleaded was that the Zinc Company received no consideration for the note and that the president of the company had no authority to execute it, and that plaintiff took the note with full notice of these defects. Neither the abstract nor the brief of the defendant refer in any manner to the endorsements under which the Bank accepted and discounted the note.

On the trial the defendant called as a witness I. S. Straus, a brother of B. F. Straus, payee of the note, who had died before the institution of this proceeding, and apparently attempted to show by him that the Bank knew the instrument in question was merely an accommodation note. The testimony of this witness was held to be incompetent

on the ground that he was a party in interest, under section 4, chapter 51, Rurd's Ill. Stat. From the briefs it is gathered that this testimony would relate to a conversation between the witness and an officer of the bank, also deceased, and considerable of the argument of both counsel concerns the propriety of this ruling; by the defendant it is relied upon exclusively for a reversal.

However this may be, what the conversation consisted of, or any statement by counsel as to what the witness' testimony would show, nowhere appears in the abstract. It does appear from the testimony of the witness Studley, who at the time the note was negotiated was assistant cashier of the Bank and in that capacity handled the note, that it was taken for consideration before maturity and without notice of any infirmity.

The abstract is the pleading of the party employing it, and where, as here, it fails to inform the court of matters relied on for a reversal the judgment will be considered as finding ample support in the record and will not be disturbed. For this reason the judgment in the present case is affirmed.

AFFIRMED.

KATE S. CARUTHERS,
Appellee.

78.

JOE MACALUSO, trading as
Joe Macaluso & Co.,
Appellant.

ALL BAL FROM MUNICIPAL COURT
OF CHICAGO.

209-4542

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit against defendant for rental due under a written lease of premises on South Clark street, and upon trial had judgment upon a directed verdict, for an amount which probably was \$397.75, from which defendant appeals.

This judgment properly could be affirmed for the sole reason that the defendant has not informed this court by his abstract as to what the verdict and judgment were. The abstract simply says: "The jury rendered its verdict, to which verdict defendant excepted," and "the court entered judgment upon the verdict." The party complaining of the judgment should inform the court by its abstract as to what it was.

That the amount of the judgment represents the correct amount due under the lease does not seem to be in dispute. It is claimed, however, in the affidavit of defense and in argument that defendant was entitled to a recoupment or set-off because a neighbor had broken into and entered the wall of the basement of the leased premises, with resulting damages to the defendant, and that this entry was by the license and authority of the plaintiff. The transcript of evidence before us consists

almost wholly of colloquy between court and repective counsel, followed by a peremptory instruction to the jury to find for the plaintiff. No evidence was offered on the part of the defendant to support his claim, and there was consequently no ruling by the court thereon which this court can review. We cannot pass upon what was said by the court and counsel in the matter of argument on a proposition, but only upon rulings and orders of the court. Defendant should have preserved his point by presenting evidence to support the allegations of his affidavit of defense, and asked for a ruling by the trial court upon its competency. Without such ruling there is nothing for this court to review.

Upon oral argument in this court documentary evidence was produced which is not in the record but which it is fairly inferable was presented to the trial court and considered by it. If this was the fact the trial court was right in its view that defendant was not entitled to either recoupment or set-off.

The judgment is affirmed.

AFFIRMED.

278 - 23623

DORA SCHOON,

Appellee,

vs.

A. H. WELCH and H. C. WELCH,
copartners trading as Welch
& Welch,

Appellants.

APPEAL FROM MUNICIPAL COURT
OF CHICAGO.

209 T.A. 544

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This action was brought by plaintiff, who lives on a farm near Munster, Indiana, for the purchase price of a quantity of onions sold to defendants through their agent, one Peter Voss, in March, 1915, the amount claimed being \$270.32.

By their affidavit of merits the defendants stated in effect that the agreement between plaintiff and Voss was that defendants should sell the onions for the account of plaintiff at the best possible price, for the usual and customary commission therefor, and that defendants received, handled and sold the onions accordingly, incurring in this connection certain expense which, including the freight charges, amounted to \$76.95; that the gross amount realized on such sale was \$156.50 and that the reasonable commission was 10 per cent. of this amount, or \$15.65; that the net amount due plaintiff after deducting the sums aforesaid was \$63.90, a check for which amount had been forwarded to the plaintiff and returned. Upon tender in court of this amount it was ordered paid to plaintiff, and the balance of the demand was reserved for future adjudication.

The case was tried without a jury; the court found the issues in favor of the plaintiff and entered

judgment on the finding for \$94.70, from which the defendants have prayed and perfected this appeal.

Plaintiff's case is predicated on the claim that the onions were sold at an agreed price f. o. b. Munster, Indiana, and in support of this there is testimony that when the contract was entered into, at the home of plaintiff, Voss, in answer to a question by one of plaintiff's sons replied that payment for the onions would be made by check "as soon as the car is rolling." A further confirming incident is the fact that a man named King was sent to the farm by Voss to see that the onions were properly weighed and in number one condition before loading.

Defendants, on the other hand, contend that the agreement was to deliver merchantable onions to them at Chicago, and that the onions arrived at this point in an unmerchantable condition; that plaintiff was so notified and came on to Chicago, and that thereupon the contract was changed so that defendants were to sell the onions for plaintiff's account; and that whatever the contract may have been prior to that time it was then changed by agreement of the parties and was binding upon plaintiff in its modified form.

We have examined the evidence in the light of the respective assertions, and are of the opinion that the greater weight is with the plaintiff. The negotiations had by the parties on plaintiff's premises constituted a completed transaction, and for aught that appears any agreement entered into subsequently differing from that made originally was without consideration and hence of no effect.

Counsel for plaintiff makes some suggestion that this court ought to increase the amount of the judgment, but

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as no cross-errors have been assigned plaintiff must be held to have abided by the judgment as entered.

For the reasons indicated the judgment of the Municipal Court is affirmed.

AFFIRMED.

MARY DOBLER,

Appellee,

vs.

T. G. O'CONNOR and THE STANDARD
BREWERY, a corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COCK COUNTY.

209 - 1110 3 18

MR. JUSTICE MCSUPPLY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit under section 9 of the
Dram Shop Act for damages for the death of her son, George,
a minor, caused by intoxication. Upon trial before a jury
she had a verdict for \$1,350 upon which the court entered
judgment; from this the defendants appeal.

From the evidence the jury properly could find
that on the evening of December 31, 1910, George Dobler, then
about 18 years of age, with three companions went to the sa-
loon of the defendant O'Connor, which he leased from the de-
fendant Standard Brewery. Dobler and his companions bought
from the bartender at the saloon intoxicating drinks consist-
ing of gin fizzes, gin rickies, cocktails and other liquors.
Each of the boys had seven or eight such drinks, and as the
result of drinking this liquor Dobler became intoxicated.
His companions noticing his condition, took him from the
saloon to the street, where he was taken with convulsions.
They helped him on a street car, with the intention of taking
him home. On the way he had two or three more convulsions and
finally became unconscious. He was attended by a doctor who
gave him a hypodermic injection and he became somewhat
quieter, but when left at his home about 3 or 4 o'clock in
the morning was still in an unconscious condition, and he died
about 7 o'clock on that morning without regaining conscious-
ness.

Section 9 of the Dram Shop Act creates a right of action against any persons who "have caused the intoxication, in whole or in part" of the intoxicated person; and the defendants argue that the words "in whole or in part" refer to the persons who partially or wholly caused the intoxication, and not to the partial or complete intoxication of the person drinking the liquor; and that in this case plaintiff has failed to charge or prove complete intoxication of George Dobler. We do not assent to this assertion concerning the declaration and proof. We are of the opinion that the declaration sufficiently charges intoxication, and the evidence is convincing as to this condition. His companions not only asserted that he was drunk but described his conduct so as to leave no doubt of the fact.

Was the intoxication the proximate cause of Dobler's death? The doctors testifying asserted that his death was due to acute alcoholism or alconcholic convulsions. A post mortem disclosed an unhealthy condition of the lungs, a condition known as edema of the lungs, which means a state of excessive fluid. There was evidence that Dobler was apparently in good health before this time, and the plaintiff testified that he had played around with other boys and had not been sick. While the condition of the lungs and heart may have weakened his powers of resistance, yet the jury were abundantly justified in concluding that if it had not been for the intoxication he probably would have lived indefinitely, and in face of the testimony of the doctors as to the cause of death we see no reason to disagree with the conclusion of the jury.

Section 9 of the Dram Shop Act provides that

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"Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person or persons."

It is argued that the "means of support" mentioned in this act must be construed to mean a legal right to support by the one who became intoxicated, and that unless such right can be enforced at law no action will lie for damages. This contention is supported by a decision of the Appellate Court for the Third District of Illinois in the case of Jury v. Ogden, 56 Ill. App. 100, where it was held that the means of support referred to in the statute are such as the person intoxicated would be legally bound to furnish. Defendants also cite the decision in Hagel v. Keller, 237 Ill. 431. We do not understand this latter case to decide unequivocally that there must exist an enforceable legal liability for support imposed upon the person intoxicated, although it was held that such a legal liability did exist in that case. The court found that in fact the plaintiff had been supported by her brother, whose intoxication had caused damages to plaintiff, and uses language from which it is fairly inferable that the court was of the opinion the statute gave a cause of action to any of the persons named, whether sustaining any business or personal relation to the intoxicated person or not, who should be injured in person, property or means of support.

The Dram Shop acts of Massachusetts and Illinois are identical, and the courts of Massachusetts in construing the statute have had occasion to pass upon this point and have expressly held that a right of action was given to any of the

persons named in the statute who might be injured in their means of support, regardless of the existence of any legal liability for such support. Such cases are Moran v. Goodwin, 130 Mass. 158, and Kellell v. Collinson, 130 Mass. 167. These cases also hold that it is a question of fact for the jury to determine how far the intoxication was an injury to the plaintiff's means of support.

We are of the opinion that the reasoning in the Massachusetts cases is persuasive, and as we do not understand that our own Supreme Court has held to the contrary in the Nagel case, supra, we shall hold that the right of action is not limited to those persons only who have a legal right to support. It follows, therefore, that the question of the amount of damages was proper for the jury to determine, and from the evidence it was justified in finding that George Dobler worked as a machinist apprentice for more than a year, receiving \$50 a month as wages, which money he gave to his mother, the plaintiff, who used it in her support and that of the family; that his father was in failing health and was compelled to give up his trade of carpenter and conducted a pool room about six months before George died; that George worked with his father in conducting this pool room several months before his death but received no wages, and that the profits from the pool room, derived from the combined labors of George and his father, went to the support of his family; that after the father's health failed and after George's death the mother was compelled to take in washing to help support the family, which consisted of herself and two younger children and the invalid father, who died about two years after George's death.

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Upon consideration of these facts the conclusion is obvious that the death of her son George resulted in substantial damages to the plaintiff. We are of the opinion that the judgment is right and it is affirmed.

AFFIRMED.

KILGORE D. INO-TYPING CO.,
a corporation.

Appellee.

vs.

ARTHUR SHANIN and HARRY
SHANIN, etc.,

Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

20914.550

MR. JUSTICE McSHEELY DELIVERED THE OPINION OF THE COURT.

On December 28, 1917, the motion of the appellee herein to strike from the record the bill of exceptions, stenographic report or statement of facts, as per suggestions, was by order of this court allowed.

Of the nine assignments of error made, all but two, Nos. 3 and 9, relate to the proceedings upon the trial, and since the bill of exceptions has been stricken these manifestly cannot be considered. Neither assignment 3 nor 9 has been briefed or argued by counsel for appellants and, following the rule frequently announced must be regarded as waived. Wabash, St. L. & I. R. Co. v. McDougal, 113 Ill. 603; Keyes v. Kimmel, 186 Ill. 109; Koelling v. Wachening, 174 Ill. App. 321.

No reason appearing why the judgment should not stand, it is affirmed.

AFFIRMED.

MARIAN S. TOLMAN,
Appellee,

vs.

DR. D. A. R. STEELE,
Appellant.

APPEAL FROM CIRCUIT COURT
OF COOK COUNTY.

209 A. 554

MR. JUSTICE MCBURNLY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment against the defendant of \$2,000 in a case tried before court and jury.

The case was originally commenced against the defendant Steele and three others. In plaintiff's declaration of two counts she first pleaded specially that at the request of the defendants she gave them twenty shares of stock in the corporation known as the "College of Physicians & Surgeons of Chicago," for which they agreed to pay her the sum of \$2,000, which they subsequently failed to do. The second count is what is called the consolidated common money counts. Summons was had on all the defendants; each filed a plea of general issue and also a special plea denying joint liability. Before the suit was tried an order was entered on motion of plaintiff dismissing as to all the defendants except Dr. Steele. The declaration, however, was not amended.

As we have concluded that the case must be reversed for another trial, it is only necessary to state briefly the reasons for this conclusion. It was error for the court to permit the plaintiff in an assumpsit suit to recover the alleged value of the property on the ground that she had parted with it because of the false and fraudulent representations of the defendant Steele, thus recovering both in tort and in contract under contradictory theories in the same action. We know of no authority that will permit a

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plaintiff who has waived the tort and brought suit in assumpsit, upon trial to waive the assumpsit and try the case as an action ex delicto; all precedent is to the contrary.

"In order to prevent the confusion which might ensue if different forms of actions, requiring different pleas and judgments, and of a different nature, were allowed to be joined in one action, it is a general rule, that actions in form ex contractu cannot be joined with those in form ex delicto." Chitty on Pleading, 9th Am. Ed., p. *201.

"The consequences of a misjoinder are more important than the circumstances of a particular count being defective; for in the case of a misjoinder, however perfect the counts may respectively be in themselves, the declaration will be bad on general demurrer, or in arrest of judgment, or upon error." Same, p. *205.

In Bardill v. Trustees of Schools, 4 Ill.

App. 94, the court said: " * * in the case of a misjoinder, however perfect the counts may be in themselves, the declaration will be bad on general demurrer, or in arrest of judgment, or upon error." It was also expressly so held in Dalson v. Bradberry, 50 Ill. 82. Counts for breach of contract and counts for rescinding the contract cannot be joined in the same declaration. T. W. & W. Ry. Co., v. Depot Building Co., 63 Ill. 308. In Noetting v. Wright, 72 Ill. 390, the court said of a similar case:

"The plaintiff seeks to recover damages in an action on the case for deceit, and also recover for a breach of contract. The object of pleading is the production of a single issue upon the same subject matter of dispute. This, the count under consideration fails to do."

And the general rule is thus stated in 31 Cyc., p. 116:

"A declaration or complaint must proceed upon a definite theory and must be good upon that theory or it will be deemed insufficient. The mingling of inconsistent theories renders the pleading insufficient to sustain a judgment. " * And under this rule no recovery can be had upon a theory other than the one upon which the pleading proceeds."

The same authority, on page 680, says: "It is a well-settled principle that no proof can be offered of matters

not put in issue by the pleadings." See, also, 1. S. & M. S. Ry. Co. v. Live Stock Bank, 178 Ill. 506; and there are many other cases supporting this familiar rule.

Evidence of fraud and deceit is not made competent by the rule that where nothing remains to be done under a contract except for the defendant to pay, the plaintiff may at his election declare generally in indebitatus assumpsit. Union M. R. R. Co. v. Nixon, 199 Ill. 238. Whether plaintiff seeks to recover upon the special contract pleaded in her first count or under the common counts, the gist of the action is the promise to pay, either under an express or implied contract, and evidence of tort is wholly irrelevant and immaterial. It should be noted that this is not a case where plaintiff has rescinded her contract, but she has specially pleaded it and asserted it in her testimony. In Story on Sales, sec. 446, quoted with approval in Hellogg & Co. v. Turpie, 93 Ill. 265, the author states the rule thus:

"Where goods have been obtained through the fraud or misrepresentation of the vendee, the vendor may either affirm the sale or rescind it and reclaim the goods. If he elect to rescind he must, as we have seen, do so within a reasonable time, and must take care to do nothing affirmatory of the contract, or his right to rescind will be lost. And in such case he should sue in trover or replevin for the goods, treating the whole contract as utterly nullified by the fraud, and he should be careful not to bring assumpsit, since, as the foundation of this action is the promise of the vendee, the contract is thereby directly affirmed, and his rights will depend upon the contract solely."

Among the items of evidence which while proper in an action ex delicto were improperly admitted in the instant case were these: Plaintiff was permitted to testify to and emphasize the sickness in her family, and the insistence of the defendant in calling her over the telephone; permitted to narrate at length the manners of the defendant upon their interview in his office, and all that was said concerning the story of the career of the defendant, and

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many other things tending to indicate the methods of defendant in ingratiating himself into the good will of the plaintiff. The door was opened upon the trial to show "anything that might establish a state of mind." Plaintiff was also asked, and permitted to answer over objection, as to her belief in the statements made by defendant. Evidence was also produced to prove the falsity of these statements, also evidence as to what plaintiff's deceased husband had paid for certain bonds. All such evidence was wholly irrelevant to the issues, and its admission was reversible error. Whether plaintiff proceeded under the special counts or the common counts, it would be sufficient to make a prima facie case to show delivery of the stock to defendant and, if possible, his express promise to pay for the same, his failure so to do, the amount he agreed to pay or the value of the stock.

What we have said indicates the character of instructions given at the request of plaintiff to the jury, which we hold were improperly given. Speaking generally, they include all those instructions which tell the jury that ingredients of the case are the alleged misrepresentations and fraudulent statements of the defendant. The injection of this issue into the case was improper.

Complaint is made of the court's action in refusing instruction No. 4 tendered by the defendant. This was in substance that if the jury should believe that no agreement was made between the plaintiff and defendant as to payment for the stock in question, it was immaterial if other persons owning stock had received money therefor. This instruction seems to us entirely proper and we are of the opinion it should have been given.

We are not in accord with the contention of defendant's counsel that the receipt given by him on September

5, 1912, to the plaintiff is conclusive upon her. It is not necessarily inconsistent with or contradictory of her evidence as to the promise alleged to have been made by defendant. The receipt is for the twenty shares of stock, with a provision that it would be held "until enough of the stock in said corporation shall have been secured, when it will be donated to the University of Illinois." The scheme in pursuance of which it was sought to acquire the stock of the College of Physicians & Surgeons contemplated that all the stock of the corporation should be donated to the University of Illinois whether any of the individual stockholders received pay or not. The evidence shows that some \$28,000 was paid by individuals interested in the new plan of transfer to various stockholders for their stock, the defendant himself contributing over \$12,000 of his own money for this purpose; but all of this stock was "donated to the University of Illinois." It cannot be said, therefore, that this condition of the receipt was necessarily contradictory of an undertaking by the defendant to pay plaintiff for her shares. In this view of the case it was not reversible error for the trial court to decline to give defendant's refused instructions Nos. 3 and 5.

In no view of the case could the judgment for \$2,000 stand. Plaintiff testified that the defendant promised to pay her as much as any other stockholder would receive. There was testimony, whose competence is doubtful, that the highest amount received by any other stockholder was fifty cents on the dollar. If the jury believed plaintiff as to the making of this promise they would be warranted in giving her a verdict for no more than the amount shown by competent evidence to have been the highest amount paid for other stock. The correct method for ascertaining the value

of stock is stated in McDonald v. Danahy, 196 Ill. 133, 135.

In view of the dismissal of all of the defendants except one, the declaration should be amended accordingly.

For the reasons above indicated the judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

453 - 23798

F. C. EASTMAN, Appellee,

vs.

CHICAGO RAILWAYS COMPANY,
Appellant.

APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

209 I.A. 567

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit to recover for damages suffered from a collision between his wagon, on which he was driving, and a street car owned by defendant. Upon trial he had verdict and judgment for \$2,400 which defendant seeks to have reversed.

The accident happened about six o'clock on the evening of October 12, 1914. Plaintiff was driving his horse and delivery wagon with a top, north on Ashland avenue, headed towards 37th place, an east and west street which crosses Ashland avenue. He was driving on the north-bound track, which is the easterly of the two tracks, his horse going at a walk. When at a point about 125 feet south of 37th place he turned westwardly across the south-bound street car tracks, intending to go into a driveway which ran west from Ashland avenue at this point. A south-bound car hit the rear part of the wagon and tipped it over on the side, throwing plaintiff to the ground.

We are of the opinion that plaintiff cannot recover in this case for the reason the greater weight of the evidence shows that plaintiff was guilty of contributory negligence causing the accident, and the defendant was not guilty of the negligent operation of the car as charged in plaintiff's declaration.

By far the greater weight of the evidence as given by the testimony of many witnesses proves that plaintiff was driving north in the northbound street car tracks between street intersections, and that when the southbound car on the other track was between 15 to 30 feet away he turned suddenly, without any previous warning or indication to the motorman, directly onto the path of the approaching car. Plaintiff himself testified that he saw the car coming towards him, although he could not say whether it was coming fast; he says: "I didn't stop to examine it; I saw the car. I couldn't say whether it was moving at the time; I rather think it was, though. I paid a little attention to it. * * I couldn't say whether it was coming or standing still * * when I turned my horse. * * I don't know how fast the car was going. * * I knew it was coming all the time. * * I did not think of the speed of the car or the speed that the car was coming at at the time I started to cross the tracks. * * I first realized that the car was going to hit the wagon when it was about 4 or 5 feet away from me."

From these statements plaintiff convicts himself of having started to cross the southbound track with utter indifference as to the distance away of the southbound car or the speed of its approach. While it may be true that a mere mistake of judgment as to approaching danger is not necessarily and always negligence, yet in the present case there was no attempt by the plaintiff to exercise judgment. To drive across the track in front of the approaching car, without giving any consideration as to its nearness or its speed, was not the exercise of the caution of a reasonably prudent man, and such contributory negligence on his part will bar a recovery.

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Journal of Management Studies, 19(1), 67-80.

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It is equally clear that the defendant, through its motorman, was not guilty of negligent operation of the car causing the accident. Eight eye-witnesses on the front platform of the car, of the large pay-as-you-enter type, agree substantially in their testimony that as plaintiff turned across the track the car was between 15 to 30 feet away, running between street intersections at a speed of 10 to 17 miles an hour; that as soon as plaintiff started to cross, the motorman immediately sounded the gong, threw off the power and applied the brakes, bringing the car to a stop with its front end somewhere between seven feet past the point of collision to half a car length past the wagon. Some of the witnesses said that the car came to such a sudden stop as to jerk the passengers all over the platform. That the motorman made as quick a stop as possible under the circumstances is amply demonstrated. The motorman had no reason to anticipate the actions of the plaintiff in driving in front of the approaching car; and he was obliged to exercise only ordinary care, to be measured by the apparent situation and the dangers naturally to be expected under the circumstances.

The facts in this case fall readily into that class of cases where the courts have held that plaintiffs are not entitled to recover, among which are Doran v. Chicago Ry. Co., No. 22961, this court, opinion filed May 28, 1917; McCormick v. Chicago City Ry. Co., 22821, this court, opinion filed June 11, 1917; Chicago U. T. Co. v. Browdy, 206 Ill. 615; Rack v. C. C. Ry. Co., 173 Ill. 289; Kick v. Cal. & So. Chi. Ry. Co., 23325, this court, opinion filed December 3, 1917; Healy v. C. C. Ry. Co., 163 Ill. App. 293; Sampsell v. Wilkie, 138 Ill. App. 518; Bale v. Chicago Junction Ry. Co., 259 Ill. 476.

For the reasons above indicated the judgment of the Circuit Court is reversed with a finding of fact.

REVERSED.

The court finds from the evidence that plaintiff was guilty of negligence which directly contributed to the accident alleged in his declaration and each count thereof, and that the defendant was not guilty of negligence as alleged in plaintiff's declaration and each count thereof which caused the accident therein set forth.

550 - 23895

RICHARD J. TON,)
Appellee,)

vs.

STEVEN HEMETH,)
Appellant,)

Appeal from

superior Court,
Cook County.

209 I.A. 568

MR. JUSTICE ROBERTLY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court dismissing an appeal from a judgment in a proceeding before a justice of the peace.

Plaintiff, Ton, brought his suit in forcible detainer, ^{by Richard J. Ton, plaintiff} against the defendant, Hemeth, before a justice of the peace to recover possession of a tract of land. Summons was issued, and trial had on November 15, 1916, and judgment rendered for the plaintiff. Defendant sought no appeal from that judgment before the justice, nor applied ^{and did not appear} to the justice to fix the amount of an appeal bond, but on November 20th presented to the clerk of the Superior Court his appeal bond, where it was filed. On January 17, 1917, ^{Summons being} there was filed with the clerk of the Superior Court the transcript of the justice of the peace, accompanied by the complaint filed and the summons. The certificate accompanying the transcript states that it is a true and correct transcript of the judgment and that it and the papers accompanying, two in number, contain a full and correct statement of all the proceedings before the justice in the cause. Neither the transcript nor any of the papers accompanying it refer to any prayer for an appeal, or to an application to fix or the fixing of the amount of the appeal bond by the justice

of the peace. Subsequently plaintiff filed in the office of the clerk of the Superior Court a limited appearance for the purpose of making a motion to dismiss the appeal of the defendant. After several continuances the motion to dismiss was allowed. ~~verdict~~
~~defendant's motion~~ X

The order of the Superior Court was proper and should be affirmed. Section 19 of the Act on Forcible Entry and Detainer provides that in case of an appeal the bond "shall be in sufficient amount to secure such rent, damages and costs, to be ascertained and fixed by the court." In Fairbank v. Streeter, 142 Ill. 226, in construing this provision the court held unequivocally that an appeal from a judgment of a justice of the peace in forcible detainer cannot be perfected by filing the bond in the office of the clerk of the court to which the appeal is sought to be taken, without first having the amount of the bond fixed by the justice before whom the case was tried. What is said in the opinion in that case is clearly applicable to the instant case and conclusive of the question. To the same effect are Bowlby v. Robinson, 45 Ill. App. 531; Saxton v. Curley, 112 Ill. App. 450; Vornees v. Schrieber, 186 Ill. App. 626.

Upon the motion to dismiss the appeal in the Superior Court defendant sought to contradict the transcript of the judgment by affidavits. It has been held many times that a transcript of a judgment imports verity and cannot be impeached or contradicted by parol evidence. Among such cases are Garfield v. Douglas, 22 Ill. 100; Zimmerman v. Zimmerman, 15 Ill. 84; Merritt v. Yates, 71 Ill. 636; Reddish v. Shaw, 110 Ill. App. 337; Downey v. People, 117 Ill. App. 591.

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The suggestion that the appeal was improperly dismissed and that the case should have been heard by the Superior Court upon its merits, or that the suit should have been dismissed, is without weight. The court followed the proper practice in every particular, as expressed in Fairbank v. Trester, 142 Ill. 226.

Other points suggested by the defendant are also without merit.

The judgment of the Superior Court is right and is affirmed.

AFFIRMED.

209/576

243 - 23809

Filed March 12, 1918

MARYANNA POLACZEK,
Appellee,

vs.

DAVE POLLAK,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

576

J. J. FROEDENBERG, JUSTICE OF THE PEACE,
DELIVERED THE OPINION OF THE COURT.

This is an action by a tenant against her landlord to recover damages for personal injuries occasioned by the giving way of a porch railing.

In passing on the points raised on appeal from a judgment in the tenant's favor we deem a minute description of the facts and circumstances unnecessary, for on careful examination of the evidence we think it sustains the implied findings of fact that the place where the accident occurred was part of a common approach or passageway for use of the landlord's several tenants over which he retained control, that the defect was not latent and that appellee was not guilty of contributory negligence.

For with sufficient evidence of these facts need we discuss law points such as the duty of the tenant, in the absence of covenants, to examine the premises, and that in the absence of a covenant to repair none will be implied, and other points not applicable when the landlord retains control over the premises.

It is urged that the railing was put to a use for which it was not intended. Appellee had climbed over the same from a bench adjacent thereto to the roof of an

adjacent building to wash one of her windows. She had stepped back on the bench and while stepping therefrom to the porch floor took hold of the railing when it gave way where it was fastened to the wall, resulting in her fall and injury. It was convenient to stand on the bench in that place to wash a window facing the porch. The action thus described could just as well have happened from such use of the bench. Plaintiff was not injured while getting over the railing but after she got over it and was stepping off the bench. It cannot be said that taking ^{hold} of the railing in stepping from the bench was either an improper use of it or a negligent act.

The railing had been nailed to an upright against the wall of the building. It is before us on an issue. It shows enlarged, worn and with attention nail holes where it was so fastened, thus supporting other evidence tending to show that the rail was loosely held in place and that its condition could not have escaped the landlord's attention in the exercise of ordinary and reasonable care on his part to keep it safe for the use and use of his tenants. Instructions are complained of; and, because it does not qualify the implied duty of the landlord to keep the premises in a reasonably safe condition for the purpose for which they are intended. On that point it is enough to say that the evidence would not warrant the finding of the fact of use of the approaches. It is not that such a finding would be the railing was part of the premises and at the time that it is enough to say that the evidence in support of such fact was in no way reflected or prejudiced.

There is no reversible error.

251 - 23217

209 I.A. 578

J. H. WALL,
Appellee,

vs.

ITALIAN VINEYARD COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This is a suit brought to recover damages for the wrongful discharge of appellee by appellant, between whom there was a contract for employment by which he was to receive certain commissions on sales of wines, etc. for appellant. His employment under the contract began March 5, 1913, and was to continue until January 1, 1914. He was discharged in the latter part of July.

The evidence showed that orders for the sale of such goods are usually made during the first four and last five months of the year, that the commissions earned during his employment amounted to \$625.11 and that for the busy months of March and April they averaged about \$175 per month. The verdict of the jury was for \$725, evidently based on the theory that plaintiff might reasonably be expected to earn proportionately as much in the corresponding busy season in the fall as he earned in the spring.

Appellant urges that the evidence presented no criterion for determining the amount of plaintiff's damages, that they were excessive, and that the jury failed to consider either plaintiff's failure to seek employment in the same line after his discharge or the value of his time while engaged in

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business on his own account.

The first point does not seem to have been raised below. The evidence of plaintiff's earnings while in appellant's employment which formed the basis of computing the damages, was not objected to and no instruction was given or refused that saved the question. But were it otherwise we think the case would be controlled by Barnett v. Baldwin Furniture Co., 277 Ill. 286, where the court held similar proof sufficient to furnish a basis for estimating probable earnings in the future. We do not think that, as contended by appellant, the difference between the contract there for payment of commissions on orders "taken and filled" and the one here which gave appellant the absolute right to reject "any and all orders" obtained by appellee, furnishes a distinction that brings the facts here within the rule against speculative damages. Presumably appellee's services were rendered with due regard to the contingencies contemplated by the contract and the conditions of the business remained unchanged so that he might reasonably have been expected to earn proportionately as much in the busy months after as before his discharge.

We think too that the jury could properly take into consideration those seasons of the year when contracts were usually obtained in that line of business and compute the probable earnings in the fall months on the basis of actual earnings in the corresponding spring months.

Appellant does not question the rule that the employer is prima facie liable for the amount the employee would have earned had he not been discharged, or that the burden of proof is on the employer to show that the employee

could have secured other employment by the exercise of reasonable diligence, as was laid down in Fuller v. Little, 61 Ill. 21, and later cases that need not be cited. But it is urged that there should have been deducted from plaintiff's prospective earnings the value of his services to himself in a business venture of his own undertaken after his discharge. The court refused a proffered instruction that it was a question for the jury to say what under the evidence was the reasonable value of the services of plaintiff to himself while in his own employ. But there was no basis for such instruction. The only evidence on the subject was that his business venture was unprofitable, and the burden of proof was on defendant to show the value of his services to himself as well as any other fact that might reduce plaintiff's damages. As defendant offered no evidence whatever and as there was sufficient evidence on which to base the damages assessed we think the judgment should be affirmed.

AFFIRMED.

281 - 23247

A. L. JONES COMPANY, a
corporation,
Appellee.

vs.

BOWMAN DAIRY COMPANY, a
corporation,
Appellant.

209 T. 1. 579
APPEAL FROM

MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This case was tried before the court without a jury and appellant stood by its motion for judgment in its favor on the ground that there was no proof of a custom, without which, it is conceded, appellee was not entitled to a judgment. As the motion should have been granted we need not consider points raised as to whether there was a contract between the parties or whether that question is raised on this record.

Assuming there was a contract wrongfully breached by appellant whereby appellee was to remove manure from the barn of appellant during the period of one year for the sum of \$50 per month still facts necessary to constitute the elements of a custom were not proven, and in denying said motion the court ruled improperly on the sufficiency of the evidence to support a judgment for appellee.

Appellee contended that there was a general custom to the effect that the person hired to draw away manure from the barn became the owner thereof and could dispose of it for his own profit, but the evidence adduced and objected to was insufficient to establish such a custom. No proposition of

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law was necessary to raise the question presented, so long as there was an objection to the materiality of the evidence and a motion predicated on the insufficiency of the entire evidence, there being no testimony tending to show a general custom in that regard and appellee's own witnesses testifying that they knew nothing of a custom with other dealers and that their conclusions were drawn from their own experiences. What was said in C. C. C. & St. L. Ry. Co. v. Jenkins, 174 Ill. 398, is applicable here: "To establish a usage or custom it is not sufficient to prove certain isolated instances. The usage must be positively established as a fact, and not left to be drawn, as a matter of inference from transactions."

We need not here repeat what are the essential elements of fact to constitute a custom. They are fully stated in the case cited and did not appear in the evidence in this case, and without them the judgment cannot stand. It must accordingly be reversed.

REVERSED.

287 - 23253

2091 A. 580

IN RE ESTATE OF WILLIAM SCHULTZ,
DECEASED.

} APPEAL FROM CIRCUIT COURT,
}
COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The question at issue on this appeal is whether \$400 that came into the hands of Caroline Urban, appellant and administratrix of William Schultz, deceased, was a gift to her by him or a part of his estate.

The matter came before the Probate Court for adjudication on objections to appellant's report as administratrix by one of the heirs, Caroline Staubner, appellant consenting to a hearing without the petition and citation provided for in Section 81 of the Administration Act. The Court having jurisdiction of the subject matter, and a petition and citation being necessary only to obtain jurisdiction of appellant in her private capacity, there can be no question of the court's power to act on such voluntary submission of her person to its jurisdiction. If, as stated in Martin v. Martin, 170 Ill. 29, she held property, claiming the same as her own, which belonged to the estate being administered under the jurisdiction of that court and she was administratrix of the estate, the relation afforded a basis for such proceedings by that court. Its conclusion and that of the Circuit Court on appeal was that such money belonged to the estate. We see no reason for disturbing it. The burden rested on appellant to show by clear proof that the

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money was a gift. (Barnum v. Reed, 136 Ill. 388.) The deceased drew \$500 from his bank account the day of his death, \$100 of which was found on his person and the rest was, she claimed, handed to her while they were going to or at the hospital where he shortly afterwards died. There was evidence of her admissions to her brother that she received such money to pay hospital and funeral expenses and would account for the same. While she denied them, there was no clear proof of a gift or of circumstances that would support the inference of one. And the credibility of the witnesses as to her admissions the court below was better able to determine than we are.

The presumptions urged in favor of her possession of the money and the conclusiveness of the inventory, whatever they might be, were rebuttable and a receipt in full for her share of the estate by the objector to the final account, which was not approved, could, of course, be explained. We see no good ground for disturbing the judgment.

AFFIRMED.

134 - 23475

PEOPLE OF THE STATE OF
ILLINOIS ex rel. FOX FILM
CORPORATION,

Appellee,

vs.

CITY OF CHICAGO and HERMAN
F. SCHUETTLE, General
Superintendent of Police of
the City of Chicago,
Appellants.

APPEAL FROM

SUPERIOR COURT,
COOK COUNTY.

109 LA 336

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

The controlling question on this appeal is whether the trial court was justified in directing a verdict for the petitioner in a mandamus proceeding to compel the respondent Schuettler, General Superintendent of Police of the City of Chicago, to grant and issue to relator, the Fox Film Corporation, a general permit to show and exhibit in said city a certain moving picture entitled "The Tiger Woman".

It appears that under section 1627 of the Chicago Code of 1911, it is the duty of the General Superintendent of Police to refuse a permit for the exhibition of a picture that is immoral. Under the ordinance, as amended, if a permit has been refused under said section "because the same tends towards creating a harmful impression on the minds of children where such tendency as to the minds of adults would not exist if exhibited to persons of mature age, the General Superintendent of Police may grant a special permit limiting the exhibition of such picture or series of pictures to persons over the age of 21 years." A special permit under such amendment was granted to relator and by this proceeding

he seeks to compel the issuance of a general permit under said section 1627.

The principal question of fact raised by the pleadings is whether the picture is immoral or would tend to create harmful impressions on the minds of children. By agreement it was exhibited on a screen to the court and jury. The court having stated that such exhibition made a prima facie case for the petitioner, respondent put in his evidence calling, first, the official charged with the duties of censorship. He described phases of the picture and testified that the refusal to grant a general permit was based on his opinion that the picture was immoral and such as tended to produce a harmful influence upon children. Other witnesses connected with the work of censorship described more fully the plot depicted in the picture and several of its scenes. The film not being brought before us, we must form our ideas thereof from their descriptions to the effect that the picture was designed to present the wiles and schemes of an unchaste woman, and circumstances of murder, robbery and theft, as incidents to her immoral purposes. It must be said, therefore, that there was some evidence, at least, tending to support the defense, which, on settled principles of procedure, required submission of the case to the jury.

The question was not alone whether the picture was immoral or had such harmful tendency but whether respondent abused his discretion in refusing a permit. The law does not contemplate that a court and jury shall sit as an appellate tribunal merely to review the censor's opinion. The basis of a mandamus proceeding in such a case must be an alleged abuse of official power. While a court or jury's opinion might differ from his, that fact alone would not

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justify the writ. The nature of his duties under the ordinances was such as to call for the exercise of official discretion, with which the courts will not generally interfere unless abused. (See Spelling on Inj. & Other Extra. Rem. Vol. 2, Sec. 1476 and authorities there cited; High on Ex. Legal Rem. (3rd Ed.) Sec. 327; 26 Cyc. pp. 156-161; 19 Am. & Eng. Enc. Law, p. 821.) When, therefore, the evidence presents grounds, as here, for a diversity of opinion as to the harmful tendency of the picture not only must the case be submitted to the jury on that question of fact, but before they can properly find for the petitioner they must also be able to say from the evidence that there was an abuse of power in refusing a permit. There was no direct proof of abuse, and therefore none unless it could be inferred from the film which is not before us. It was made an exhibit but is not annexed to the record nor certified to us. While its absence precludes us from passing on the sufficiency of the evidence it does not preclude determining whether there was any evidence tending to support respondent's answer. There being some evidence so tending, it follows that on well settled principles the court could not properly direct a verdict for petitioner.

To appellee's contention that a verdict in a mandamus case is advisory only, it is enough to say that Sections 4 and 5 of the mandamus statute have always been regarded as recognizing the right to a trial by jury in a mandamus proceeding the same "as in other cases at law". Whether the right may be invoked as a constitutional one is a question not before us.

For the reasons stated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

217 - 23561

VITAGRAPH COMPANY OF AMERICA,
a corporation,

Appellee.

vs.

HERMAN F. SCHUETTLER, General
Superintendent of Police of the
City of Chicago,

Appellant.

209 A. 595

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT.

This appeal brings for review the overruling of a general demurrer to a petition for mandamus to compel Herman F. Schuetzler, as General Superintendent of Police of the City of Chicago, to issue a permit under the city's ordinances to exhibit a certain photoplay "Within The Law". While certain averments raising questions that need not here be discussed, might be repugnant to a special demurrer, it is enough to say, without setting them forth, that we do not think they were repugnant to a general demurrer.

It is contended that the petition sets up mostly conclusions as distinguished from allegations of fact. While it contains surplusage and much that is subject to criticism it sufficiently sets forth by appropriate averments grounds for the writ in so far as it pleads facts tending to show that the photoplay, as represented by the film, conforms to and does not in any way conflict with the requirements of the city's ordinances, and that a permit was arbitrarily refused. We deem it unnecessary in support of this conclusion to enter into a discussion of its lengthy and numerous averments. Hence, appellant, having elected to

stand by his demurrer, the judgment awarding the writ will be affirmed.

But it was not in accordance with practice or the spirit of the law for the court to defer passing upon the duly presented motion for appeal until after the writ had issued. Its action in that regard, however, has no bearing on the question of error in entering the judgment.

AFFIRMED.

EPOCH PRODUCING CORPORATION,
Appellee,

vs.

~~CITY OF CHICAGO et al.,~~
Appellants.

209 I.A. 596

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE BARNES
DELIVERED THE OPINION OF THE COURT,

Appellee filed its petition for a writ of mandamus to compel the issuance of a permit to exhibit a photoplay called "The Birth of a Nation", pursuant to what is designated as section 1627 of the city ordinances. Appellee already held a so-called "special permit" which limits exhibitions to adults, as authorized by an amended ordinance. A permit under section 1627 imposes no such restriction.

The case contains voluminous pleadings which digress far afield from material issues and was decided on those that were immaterial. To entitle the petitioner to the relief sought it was merely necessary to aver facts to show that the photoplay met every requisite of the ordinance and was arbitrarily or capriciously refused. The petition contained averments of that character, the answer raised an issue thereon, and on them the case should have been tried.

But the real issues were lost sight of in petitioner's attack on the validity of the amended ordinance, which had nothing to do with the case.

This legal "camouflage" so diverted subsequent proceedings that this appeal went to the Supreme Court on the constitutionality of the amended ordinance, and, because of its manifest irrelevancy to the real issues, has in

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due course been transferred to us.

A special demurrer directed to the averments relating to the amended ordinance having been improperly overruled, respondents answered and took issue thereon. To add to the confusion the replication set up, among other immaterial matters, a chancery proceeding between the same parties wherein respondents were enjoined from revoking said special permit. A special demurrer to parts of the replication was carried back and sustained to certain parts of the answer, but left issues formed on said material parts of the answer and raised by immaterial parts of the replication, and thereupon a general rejoinder was filed. In this state of confusion the court found that only a question of law was involved.

The judgment order recites that the cause came on for hearing on the demurrer to certain parts of the replication, that it was carried back and sustained to certain parts of respondent's answer (not, however, to the parts taking issue on the material averments in the petition), that it was overruled as to that part of the replication setting up the chancery proceeding, that leave was given to file a rejoinder, and thereupon the cause came on for hearing on the petition, answer, replication and rejoinder, and yet they presented no question of fact.

The order then finds that "the only permit within the power of the respondent to issue" is one under section 1627; that the special permit was "unauthorized and illegal" but was tantamount to a permit under section 1627. While the last finding would seem to obviate any need of another permit under section 1627, yet the order therefor was in accordance with the prayer for relief, and supposedly gave

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color to the constitutional question.

We have said enough to indicate what are the material issues in such a case, and, if not, reference may be made to opinions this day filed in other cases of a similar character, to-wit, 23378, People ex rel. Guggenheim, v. City of Chicago et al.; 23497, People ex rel. Konzack, v. Schuettler; 23475, People ex rel. Fox Film Corp. v. City of Chicago et al.

The trial court's disregard of the material issues of fact, to say nothing about erroneous rulings on the demurrers, requires a reversal of the judgment and remanding the cause. If there is another trial the obvious propriety of revamping the pleadings so as to present material issues only is too obvious for direction.

REVERSED AND REMANDED.

209 I.A. 1917

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

FRANK KASKER,

Plaintiff in Error.

ERROR TO
MUNICIPAL COURT
OF CHICAGO.

MR. PRESIDING JUSTICE BARNES

DELIVERED THE OPINION OF THE COURT.

Plaintiff in error was found guilty "in manner and form as charged in the information herein" which averred that he "on the 4th day of August, A. D. 1917, at the City of Chicago, aforesaid, did then and there unlawfully drive or operate an automobile upon a street or highway in the State of Illinois in the absence of the owner of such automobile and without said owner's consent in Viol. Sec. 269, Chap. 121 R. S., contrary" etc.

The information is based on Section 15 of the Motor Vehicle Law prohibiting the use of a motor vehicle upon a street or highway in this State in the absence of the owner thereof without said owner's consent. (Chap. 121, par. 269o, Hurd's R. S. 1916.)

The information is insufficient to sustain the judgment in that it fails to allege the ownership of the automobile. It is a rule of criminal pleading that in indictments for offenses against persons or property the name of the party injured must be stated, and the necessity for so doing is to enable the defendant to plead either a formal acquittal or conviction in case of a second prosecution

for the same offense. (Willis v. People, 1 Scam. 399; Aldrich v. People, 225 Ill. 610; Arch Crim. Pr. & Pl. Vol. 1, p. 245, note 2.) Ownership of the property is held to be a necessary averment in an indictment for such an offense. (Aldrich v. The People, supra; People v. Brander, 244 Ill. 26; People v. Krittenbrink, 269 id. 245.) In the Brander case the indictment was held to be insufficient because it lacked any averment of ownership, and we may appropriately repeat what the court there said that "courts must abide by long established and well known rules of law, and it is not too much to require reasonable attention to such rules in drawing indictments."

Of course the same rule pertains to informations, and because of the insufficiency of the one before us for want of an averment essential to the offense, the judgment can not stand.

The record does not show that the point was directly raised in the court below yet the question may be raised on a writ of error when it appears from the face of the record that the judgment can not possibly stand. (Klawanski v. The People, 218 Ill. 481; Moore v. The People, 26 Ill. App. 137; People v. Weiss, 168 id. 502.)

If the point had been raised below the information would probably have been amended. As plaintiff in error did not see fit to raise the question where the defect could be remedied, the cause should be remanded for opportunity to make necessary amendments, in order that if plaintiff in error is guilty of the offense intended to be charged, as may be presumed in the absence of a bill of exceptions, justice may not ultimately be defeated.

In view of our conclusions it is unnecessary to consider the other points urged as error that are not likely to arise again if the information is amended and another trial had.

REVERSED AND REMANDED.

379 - 22813

38572

PHILIP S. CRAIG, as surviving
partner of W. C. CRAIG AND
COMPANY,

Appellant,

vs.

YAZOO & MISSISSIPPI VALLEY
RAILWAY COMPANY, a corporation,
Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

209 L.A. 509

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

Appellant, plaintiff below, brought an action in tort against the Yazoo & Mississippi Valley Railway Company for the wrongful burning of a quantity of cotton. The jury found the issues for the defendant and the court entered judgment upon their verdict.

At the time of the destruction of this cotton, it was in the possession of the Gulf Compress Company, whose premises were located adjacent to and within 200 feet of defendant's tracks, within the corporate limits of Clarksdale, Mississippi. On Sunday, June 11, 1911, one Antone of Clarksdale ordered of defendant a special train to make a hurried trip to Greenville, Mississippi. Pursuant thereto, defendant made up a train, consisting of two coaches and a locomotive attached thereto, which was hastily fired up with wood and coal. This train departed from defendant's Clarksdale station, passing the compress in question. Shortly after the passing of this train, fire was discovered on the premises of the cotton compress, which spread rapidly and destroyed a quantity of cotton estimated to be worth approximately \$100,000.00. It is the theory of plaintiff that the fire was caused by sparks emitted from the locomotive of

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defendant's said train.

Defendant contends that the fire was caused by the carelessness or misconduct of some negroes who were on the premises just prior to the time when the fire was discovered.

Plaintiff specially pleaded and sought to introduce in evidence, a statute in force in the state of Mississippi, which provided as follows:

"Any railroad company having right of way may run locomotives and cars by steam through cities, towns, villages, at the rate of six miles an hour and no more; and the company shall be liable for any damages or injury which may be sustained by any one from such locomotive or cars whilst they are running at a greater speed than six miles an hour through any city, town or village. The railroad commission shall have power to fix and prescribe limits in cities, towns and villages in which railroad companies may run locomotives and cars by steam at a greater rate than six miles an hour, and whenever it shall have fixed and prescribed such limits in any city, town or village this section shall not thereafter apply to the running of cars and locomotives by steam within the same."

Upon general objection of the defendant, the court excluded said statute.

As we view the issues in this case, the statute just quoted had a material bearing upon them. The controverted questions of fact were, (1) whether the fire was caused by sparks from defendant's locomotive, and (2) if so, whether defendant was negligent in the equipment and operation of same. The speed of defendant's said train as it passed the compress was testified to as being from three to sixty miles per hour. There is also evidence in the record tending to show that while a train is getting under way, the tendency of the engine to emit sparks is augmented as its speed increases, and that it varies according to the load carried and the condition of the track. It has been held by the Supreme Court of Mississippi that the operation of a train in

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violation of the said statute constitutes negligence per se (A. & V. Ry. Co. v. Phillips, 70 Miss. 14); and that the said statute applies to all manner of damage caused by trains while operated at a speed in violation thereof. (L. N. O. & T. R. R. Co. v. Natchez R. R. Co., 67 Miss. 399.) It is obvious, therefore, that the said statute should have been admitted in evidence and that its exclusion constituted reversible error.

It is argued by defendant that it was plaintiff's duty to negative the proviso contained in the said statute and that because of his failure to do so the court properly excluded same. According to the weight of authority, the rule is that "where the exception is descriptive of the offense, it must be negatived in order to charge the defendant with the offense, but if the exception or proviso is in a subsequent clause, or in the same one but not incorporated within the enacting clause by any words of reference, it need not be negatived but is a mere matter of defense." (Sokol v. People, 212 Ill. 238, and cases there cited.) A proviso which withdraws a case from the operation of the statute need not be negatived. (People v. Butler, 268 Ill. 635.) The same rule has been applied in statutory civil actions. (ibid.) The proviso contained in the statute under consideration forms no part of the enacting clause nor does it make any reference thereto. It simply empowers the railroad commission to withdraw any city, town or village within the state of Mississippi from the operation of the statute. Hence, it was a matter of defense and, under the rule established by the authorities just cited, plaintiff was not obliged to negative same.

Nor is defendant's contention tenable, that the statute is penal in its nature and therefore unenforceable

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in this state. While it is true that the courts of one state will not execute the penal laws of another, yet such rule has no application to a statute of this kind which merely authorizes a civil action to recover damages for a civil injury. N. P. R. R. Co. v. Babcock, 154 U. S. 190.

The further point is made by defendant, that the said statute was not admissible because at the time it was offered by plaintiff there was no evidence tending to establish a causal connection between the speed of defendant's train and the tendency of its engine to emit sparks. And it is argued, that because the evidence tending to show such connection was not introduced until after the said statute was offered in evidence, defendant's general objection thereto was properly sustained. In our opinion, however, defendant's general objection to the introduction of the said statute was not sufficient. Defendant should have objected specifically thereto, in order to afford plaintiff an opportunity to remove the objection. It has been frequently held, that it is only when evidence is inadmissible for any purpose that a general objection will suffice. C. R. I. & P. Ry. Co. v. Ratheneau, 225 Ill. 283; I. C. R. R. Co. v. Wade, 206 Ill. 523.

Plaintiff also sought to introduce in evidence certain rules in force on defendant's line of road at the time of the happening of the fire, all of which were excluded by the court, and we think properly so because of their irrelevancy. Rule No. 1198 provided, in effect, that engine-men should not work steam while passing loading platforms or trains with exposed cotton, if possible to avoid doing so. Inasmuch as the evidence showed that there was no exposed cotton on the loading platform and no passing train at the time and place in question, the rule had no application.

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• *Journal of the American Medical Association*, 2000; 284: 1039-1044.

• *Journal of the American Medical Association*, 1967, 201: 1001-1002.

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PLATE 22

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Plaintiff also sought to show by the testimony of several witnesses, that prior to the time of the fire, it was the custom of enginemen to shut off steam while passing the compress. The evidence fails to show, however, that the conditions at the times referred to by the witnesses were similar to those existing at the time and place in question, nor did their testimony purport to include all trains which passed the compress, while there is evidence that frequently prior to the happening of the fire in question, there was exposed cotton on the loading platform adjacent to defendant's tracks in front of the compress, at which times the enginemen of passing trains shut off steam. This plaintiff concedes in his brief and he further admits that the custom of shutting off steam was in compliance with the rule No. 1198 hereinabove referred to. The rule itself being inadmissible, clearly the custom sought to be shown in conformity therewith was likewise inadmissible.

Other errors have been assigned which we deem it unnecessary to consider, as the judgment must be reversed and the cause remanded for the reasons hereinabove assigned.

REVERSED AND REMANDED.

20914616

FRANK F. FISHER,
Appellee,

vs.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

THE MASSILLON IRON & STEEL
COMPANY, a corporation,
Appellant.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant from a judgment for ^{\$8,916.67} \$8,916.67, rendered in favor of the plaintiff for salary, upon a finding of the court without a jury.

¹⁸⁹⁹ Defendant is a corporation, organized in the year 1899 under the laws of the State of Ohio, and is engaged principally in the manufacture and sale of iron pipe. In ¹⁹⁰⁰ March, 1900, plaintiff was elected a director and vice president thereof, and thereafter in each year to and including February, ¹⁹¹² 1912, at the annual meeting of the stockholders and directors, he was reelected a director and vice president of defendant company. At the beginning of his employment, and for several years thereafter, plaintiff's salary was ^{\$3,500} \$3,500.00 per annum. In February, 1904, it was increased to ^{\$5,000} \$5,000.00, and on February 4, 1907, his annual salary was fixed at ^{\$10,000} \$10,000.00. During the year 1910 it was sought by defendant to reduce plaintiff's salary to ^{\$5,000} \$5,000.00, but, upon the protest of plaintiff, it was continued at the ^{\$10,000} rate of \$10,000.00 per year.

In December, ¹⁹¹¹ 1911, defendant company being in financial straits, due to the defalcation of its president, a meeting of the directors was held at Massillon, Ohio, for the purpose of formulating some plan whereby to continue

the existence of the company on a sound financial basis. Among other things, a resolution was passed, to the effect that all salaries of officers and employees receiving over ~~\$100.00~~^{\$100.00} per month be reduced ~~fifty~~⁵⁰ per cent. To this reduction apparently all the officers, including plaintiff, consented. At this time the manufacturing plant of defendant had suspended operations. On February 5^{5, 1912}, 1912, the directors re-elected plaintiff vice president of the company, at which time they passed a resolution to the effect that all salaries were for the time being to be continued at the reduced rate. To this the plaintiff apparently agreed. The plant remained inactive from December 14, 1911^{14, 1911}, until about March 4, 1912^{4, 1912}, when operations were resumed; but shortly thereafter it was again closed, until some time in May, 1912¹⁹¹². At a meeting of the directors held March 8^{8, 1912}, 1912, it was decided to restore all salaries to the rate existing prior to January 1, 1912. Plaintiff's salary was thereby restored to the previous rate of ~~\$10,000.00~~^{\$10,000.00} per year. On March 14, 1912^{14, 1912}, another meeting of the directors was called for the purpose of effecting a reorganization of the company. At this meeting plaintiff, who was then a large stockholder, refused, through his proxy, to consent to the reorganization plan proposed, as a result of which the proposed plan was abandoned. On the same day, after the said meeting, one Russell, then president of the defendant company, wired plaintiff as follows: "Sell no more pipe. Close your office. Send all mail here. Answer." A few days later Russell wrote plaintiff a letter confirming his telegram. To this letter plaintiff made reply under date of March 16^{16, 1912}, setting forth that he would hold himself in readiness to perform the duties theretofore performed by him and would look to the defendant company for the payment of his salary in

accordance with his arrangement, notwithstanding the terms of Russell's letter. On March 21, 1912, at a meeting of the board of directors, the action taken by them on March 14, approving the plan of reorganization, was rescinded, and a second plan formulated. At this meeting they also adopted the following resolution with respect to plaintiff's connection with the company:

"RESOLVED: That W. F. Fisher is hereby removed from the employ of this company as Sales Agent or the so-called resident manager of this company at Chicago, Illinois; and that the actions of the president and executive committee in discharging him and demanding that he turn over all papers and property to the company are hereby ratified and confirmed, and that said W. F. Fisher be paid his salary as such sales agent or so-called resident manager of the company for the month of March, 1912, at the rate of eight hundred and thirty-three and 33/100 dollars (\$833.33) per month, by crediting the balance due said W. F. Fisher on the same upon his account upon the books of the company; and that beginning with the month of April, 1912, he be given a salary of ten dollars (\$10.00) per month as Vice President of this company, also to be credited to him on the books of the company so long as he is indebted to the company."

Subsequently plaintiff brought this action for salary as vice president and sales manager, for the year ending January 31, 1913.

The declaration originally filed consisted of the common counts. Afterwards plaintiff filed an additional count setting forth, substantially, that on the first day of February, 1912, defendant agreed to and did employ plaintiff as its vice president and general sales manager, for the period of one year from said date; that plaintiff then and there accepted said employment; that in consideration thereof the defendant undertook and promised to pay the plaintiff as his salary, the sum of \$10,000.00 per annum, payable monthly; that he entered said employment of the defendant as its vice president and sales manager and so continued until the 25th day of March, 1912, when the

defendant, without any reason or just cause, discharged the plaintiff from such service and employment and refused to allow plaintiff to continue therein.

Defendant filed a plea of general issue with an affidavit of merits, alleging that plaintiff had misconducted himself as sales manager, and had been discharged by defendant prior to March ^{21, 1912}. After the hearing, but before judgment, by leave of the court, defendant filed its amended affidavit of merits, wherein it averred that "under the regulations of the defendant company, having the force and effect of by-laws, the directors had the power to fix the duties and salaries of the officers of the corporation; that in the lawful exercise of such power and in the conduct of defendant's business, the directors of the defendant company fixed the salary of plaintiff as vice president at the sum of ^{\$416.66} \$416.66 for the month of February, 1912, at the sum of ^{\$833.33} \$833.33 for the month of March, 1912, and at the sum of ^{\$10.00} \$10.00 per month for the balance of the year to and including the month of January, 1913;" that plaintiff was not discharged by defendant as vice president, and that it was not guilty of a breach of any contract of employment entered into, by and between plaintiff and defendant.

The cause proceeded to a hearing before the court without a jury, and after finding the issues for the plaintiff, the court entered judgment thereon.

No claim is made by defendant in its brief, nor does the record show that plaintiff was guilty of any misconduct in the performance of his duties while acting for and on behalf of the defendant company.

The chief contention made by defendant is, that the plaintiff was elected as vice president; that there was no office of sales manager; that the duties assigned to

him as vice president were those of sales agent, or manager in charge of sales at Chicago; that by virtue of its by-laws and regulations, which, under the statutes of Ohio, had the force of by-laws, and the resolution of the directors passed on February 5, 1912, it reserved the right to fix the duties and salaries of its officers from time to time; that during March, 1912, in the lawful exercise of such power or right, in the conduct of the business, and because of conditions then surrounding the company, the directors relieved plaintiff of all but nominal duties as vice president, and reduced his salary to \$10.00 per month for the remainder of the year, to and including the month of January, 1913.

More briefly stated, it is the theory of defendant that by reason of its by-laws and the resolution passed on February 5, 1912, by its directors, the contract of employment between plaintiff and defendant was terminable at the will of the directors, or that it had reserved the right to alter its terms at any time that it was deemed expedient to do so.

The by-laws and regulations of the defendant company provided that the officers, when duly elected, should continue in office for the period of one year and until their successors had been elected. For eleven years prior to 1912 plaintiff had been elected to the office of vice president, during which period he performed continuously the duties of sales manager, which, it must be conceded, were incident to the office of vice president. Since the year 1907 plaintiff's salary was \$10,000.00 per year. When the directors re-elected plaintiff to this office in 1912, the presumption was that his duties were to continue as before, and at the same salary (Crane Bros. v. Adams, 142 Ill. 125), except as temporarily

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reduced by the resolution of employment. The reduction in salaries therein referred to was, so far as the record shows, pursuant to the resolution passed in December, 1911, to which plaintiff and the other officers apparently consented, and was obviously intended to be only temporary, pending the re-organization of the company. This became manifest on March 8, when all officers' salaries, including that of the plaintiff, were restored to the former rate, and thenceforth, up to the time of the alleged breach, plaintiff's salary was paid on the former basis of \$10,000.00 per year. In view of all the evidence before us, we are led to the conclusion that the intention of the directors was to re-elect the officers at the former salaries, subject to a temporary reduction while the reorganization of the company was under way; that this intention was understood and acquiesced in by the officers whose salaries were thereby affected, including the plaintiff; that by consenting to this reduction, plaintiff waived none of his rights under the original contract of employment; that when the directors restored plaintiff's salary to \$10,000.00 per year on March 8, this was simply carrying out their intention at the time of plaintiff's re-election, and was not subject to further alteration without the consent of the plaintiff.

Nor can it be seriously contended that defendant had elsewhere reserved the right to alter plaintiff's contract at will. It is true, the by-laws provided that the officers of defendant company were under the direction and control of the directors, and that their duties and salaries were to be fixed by the directors. In our opinion, the only reasonable construction that can be placed thereon is, that the salaries and duties of officers were to be fixed by the directors at the outset, but, once fixed, they could not be altered during the

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term of the employment without the consent of the officer whose rights or interests were to be thereby affected.

In Trustees v. Schaefer, 63 Ill. 243, an employee who had been discharged brought suit for his wages, claiming that he had a contract of employment in the form of a resolution of the board of trustees, whereby the time and terms of his employment were definitely fixed. The trustees contended, by way of defense, that the statute gave them the right to discharge the employee at will. The court in passing upon this contention, held:

"The language of the act is, that the trustees may remove any officer or employee if the interests of the institution require the removal. This would confer the power of removal if there was no special contract for the service of the employee for a definite time. But it does not give the right to discharge a servant, without any dereliction on his part, when he has been engaged for a fixed period. If a corporation desires to retain the right of removal at its discretion it must not bind itself by a special contract. The law will not permit it to disregard the terms of its contract, but it must be governed by the same rules as is a private person."

Plaintiff's election to office constituted a contract for one year, (Dashit v. Holmes Co., 120 La. 86). In view of the fact that plaintiff had performed the duties of sales manager continuously for eleven years, as vice president, there can be no question that these duties were incident to the office of vice president, and that the contract of employment contemplated the performance by plaintiff of these duties as before. By relieving plaintiff of his duties as sales manager, defendant therefore committed a breach of its contract.

It is also contended that plaintiff was bound to make every effort to mitigate the damages by endeavoring to secure similar employment for the remainder of the contract period. While this is a correct statement of the law, yet there is nothing in the record to indicate that plaintiff did not make a reasonable effort to secure other employment

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after his discharge by the defendant. The burden of showing that he might have obtained other employment was on defendant, such evidence being admitted only to mitigate the damages.

Fuller v. Little, 61 Ill. 21; Howay v. Going-Northrup Co., 6 L. R. A. (N.S.) 49, and cases cited in note 12, p. 108.

It is further argued by defendant, that proposition of law No. 3, which was held by the court, is inconsistent with the judgment for plaintiff. That proposition was, in effect, that where, upon the election of an officer of the corporation, the directors fix the duties and salary of such officer for the present, and afterwards they relieve such officer of active duties, and at the same time reduce his compensation to a nominal amount, such action does not amount to a discharge, and is therefore not a breach of his contract of employment.

As an abstract proposition of law, it may be that this is correct. In our opinion, however, it is not applicable to the facts in the case at bar. When plaintiff was elected to the office of vice president in February, 1912, there was a presumption that his salary and duties would continue as before, subject to the temporary reduction acquiesced in by plaintiff. But it was clear, nevertheless, that plaintiff was re-elected by the directors to hold the same office and perform the same duties as he had for eleven years theretofore. The proposition of law entirely ignores these important circumstances.

Finally it is urged that no recovery can be had by plaintiff either under the common counts or on the special count contained in his declaration. We think, however, that for a breach of contract, where plaintiff has partly performed and has been prevented from performing the remainder by act of the defendant, a recovery may be had under either the indebitatus assumpsit or under the special count. Mt. Hope

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Cemetery Assn. v. Weidenmann, 139 Ill. 67.

There being no error in the record which justifies
a reversal, the judgment will be affirmed.

AFFIRMED.

201 - 23167

2091.4.618

WILLIAM H. KIDSTON,
Appellee.

vs.

THE MASSILLON IRON & STEEL
COMPANY, a corporation,
Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment for \$30,851.00, recovered by William H. Kidston against the Massillon Iron & Steel Company, in an action of trover for the wrongful conversion of 650 shares of its capital stock.

This cause was heard upon the same evidence, and the record presents the same questions passed upon by this court in Gorman et al. v. Massillon Iron & Steel Company, general number 23165, in which an opinion was this day filed. The conclusions therein reached by us are therefore decisive of the questions here presented, and hence the judgment will be affirmed.

AFFIRMED.

WILLIAM A. STUART,
Appellant,

vs.

JOSEPH FEGERS, ALBERT STORTS,
WENDELIN MEYER & SONS, GUS
BERKES, HITTEL CIGAR COMPANY
and ANHEUSER BUSCH COMPANY,
Appellees.

APPEAL FROM
CIRCUIT COURT,
COOK COUNTY.

209 I.A. 623

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order directing that certain moneys in the hands of the clerk of the Circuit Court be paid to certain defendants therein named.

It appears from the evidence, that complainant purchased a saloon and cafe from defendant, Joseph Fegers, for the sum of \$2500.00; that he paid \$1250.00 in cash and gave nine notes, secured by chattel mortgage, for the remainder, and also entered into a contemporaneous agreement, by the terms of which the said Fegers agreed to pay all outstanding indebtedness incurred by him in connection with the said saloon and cafe business, within sixty days from the date thereof. This contemporaneous agreement provided further, that if the said indebtedness was not paid within the time specified, the aforesaid notes and chattel mortgage should become null and void. The evidence further shows that the said Fegers failed to pay the said indebtedness in accordance with his agreement; that several judgments had been entered against him by certain of his creditors, who had threatened to attach property sold and assigned by the said Fegers to the complainant.

All of the foregoing facts were set forth in the

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bill of complaint, which recited further that the said notes had been assigned and transferred by the said Fegers to persons unknown to the complainant, who were also made parties defendant.

The bill prayed that the said notes and chattel mortgage be declared null and void and of no effect; and that the court issue an injunction restraining the defendants from foreclosing or attempting to foreclose the said chattel mortgage and from collecting, negotiating, transferring or assigning the said notes.

Upon the recommendation of a master, a temporary injunction was granted as prayed, - upon condition, however, that complainant pay to the clerk of the court the amount then due on one of the notes in question, the said payment to abide the further order of the court. Similar orders were subsequently entered from time to time as the other notes matured, until complainant had fully paid all the notes to the clerk of the court.

Defendant Fegers filed a general and special demurrer to the bill of complaint, while the other defendants, who were described as the unknown owners and holders of the said notes, entered their appearances and made answer to the bill.

Upon a hearing, the court entered the decree herein complained of, which directed that the moneys which had been paid to the clerk of the court by complainant pursuant to its aforesaid orders, be paid to the legal owners and holders of the said notes (being the defendants herein mentioned, other than the said Fegers) upon their surrender.

The record contains no certificate of evidence; neither does the decree itself recite any findings of facts to support it. The recital in the decree, that the equities

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of the case and the right to the said funds were with the defendants, was insufficient. (Gray's Lake M. B. Church v. Metcalf, 245 Ill. 54.) Furthermore, no disposition was made of the demurrer filed by defendant Eegers, to the bill of complaint. The action of the court in entering this decree, which in effect disposed of the subject matter of the suit, before issue had been joined, and without also disposing of the bill of complaint or dissolving the injunction, was clearly erroneous.

For the reasons assigned, the decree will be reversed and the cause remanded for further proceedings not inconsistent with the views hereinabove expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

271 - 23237

N. A. WILLIAMS COMPANY,
a corporation,
Appellee,

vs.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

C. J. MCCARTHY, CITY OF BERWYN,
CHARLES S. SMITH, Individually,
and as President of the Board of
Local Improvements of the City
of Berwyn, and UNKNOWN OWNERS of
certain bonds,

ON APPEAL OF CHARLES S. SMITH,
Appellant.

209 I.A. 624

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree ordering appellant, Charles S. Smith, individually, and as treasurer of the Diamond-Smith Company, a corporation, to deliver up within three days from the entry thereof, to the clerk of the Circuit Court, certain bonds issued by the City of Berwyn, and in default thereof, that the complainant (appellee) have and recover against the said Charles S. Smith a personal decree for the sum of \$620.86.

This proceeding was brought by appellee under section 23 of the Mechanics Lien Act, which provides that any person who shall furnish labor, material etc. to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement. The bill of complaint alleged that appellee had furnished material to one McCarthy, the contractor for the erection of a sewer for the City of Berwyn; that lien notice had been duly served upon the said City of Berwyn; and that at the time of the service of said notice there was unpaid

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on the contract a certain sum, therein mentioned.

The court, by its decree, found that the said City of Berwyn had been duly served by appellee with notice for a lien on the said bonds, after which it delivered them to the said McCarthy, who in turn sold them to the Diamond-Smith Company, a corporation, and delivered same to appellant, Charles S. Smith, as its treasurer; that the consideration for the said sale and delivery was paid by the said Diamond-Smith Company, which the decree recited was controlled by the said Smith.

The sole question here presented for determination is, whether the court properly entered a personal decree against appellant, Smith, for failure to deliver the said bonds as decreed by the court. In view of the court's finding in its decree, that the said Diamond-Smith Company was a corporation; that the consideration for the sale of the said bonds was paid by it; and that said bonds were delivered to the said corporation, through the said Smith as its treasurer (to none of which findings appellee objected), we are of the opinion that the court erred in rendering a personal decree against the said Smith for the failure of the company, and of him as treasurer, to deliver over the said bonds. The corporation, being a legal entity, Smith, as its officer, could not be penalized by a personal judgment against him for the failure of the corporation and of him as its treasurer, to comply with a rule of court. Therefore, insofar as the decree holds the said Smith personally liable for the said indebtedness, it will be reversed.

REVERSED AND REMANDED.

277 - 23243

ARTHUR WOLF, Appellant,

vs.

ELODIA T. DICK, Appellee.

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

209 I.A. 626

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This was an action in replevin to recover possession of a diamond ring. The court found that the defendant had a lien thereon for the payment of certain moneys claimed to be due her from the plaintiff, to secure the payment of which the ring in question was pledged with the defendant. From this finding of the court plaintiff has prosecuted this appeal.

No questions of law are raised on this record which in our opinion merit consideration. The question presented for the determination of the trial court was one of fact, viz., whether or not the plaintiff was indebted to the defendant, and if so, whether or not the ring in question had been delivered by the plaintiff to the defendant to secure the payment of such indebtedness.

Without analyzing the evidence on these issues, which was somewhat conflicting, it is sufficient to say that it amply supports the finding of the court, and hence the judgment will be affirmed.

AFFIRMED.

67 - 23391

PEOPLE OF THE STATE
OF ILLINOIS,

Defendant in Error,

vs.

HENRY BROWN,

Plaintiff in Error.

209 I.A. 627

ERROR TO

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This writ of error brings up for review the judgment of the trial court finding plaintiff in error guilty of the criminal offense of "being an inmate of a house of ill fame for the practice of fornication."

In the case of People v. Rice, 277 Ill. 521, the court held that the word inmate, as used in sec. 57a-1 of the Criminal Code refers only to one who is there for the purpose of plying her business, and that it necessarily refers to a woman. It follows, therefore, that the plaintiff in error was improperly convicted, and accordingly the judgment will be reversed.

REVERSED.

SECRET

1. The first group of people who are interested in the results of the study are the researchers themselves. They want to know how well the study was conducted and whether the results are reliable and valid. They also want to know how the study was funded and whether there were any conflicts of interest.

Journal of Management Education 32(10) 1175-1184

Journal of Management Education 30(6)p.789-804

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

1. The first is the fact that the Commission has not yet received any information from the Government of the United States regarding the results of its investigation into the activities of the Committee.

1. The first step is to identify the problem or question that needs to be addressed. This involves understanding the context and the specific requirements of the task.

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10. *Chrysomelids* (see also 11. *Chrysomelids*)

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1. The first part of the report, which is the most important, is the introduction. This part should be written in a clear and concise manner, and should provide a brief overview of the project and its objectives. It should also include a statement of the problem being addressed, and a description of the methods used to solve the problem.

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23958

NATHAN TURETZKE,
Appellee,

vs.

FRANK MEYER, LOUIS SWEENEY,
and FRED NORTON,
Appellants.

INTERLOCUTORY.

APPEAL FROM

CIRCUIT COURT,

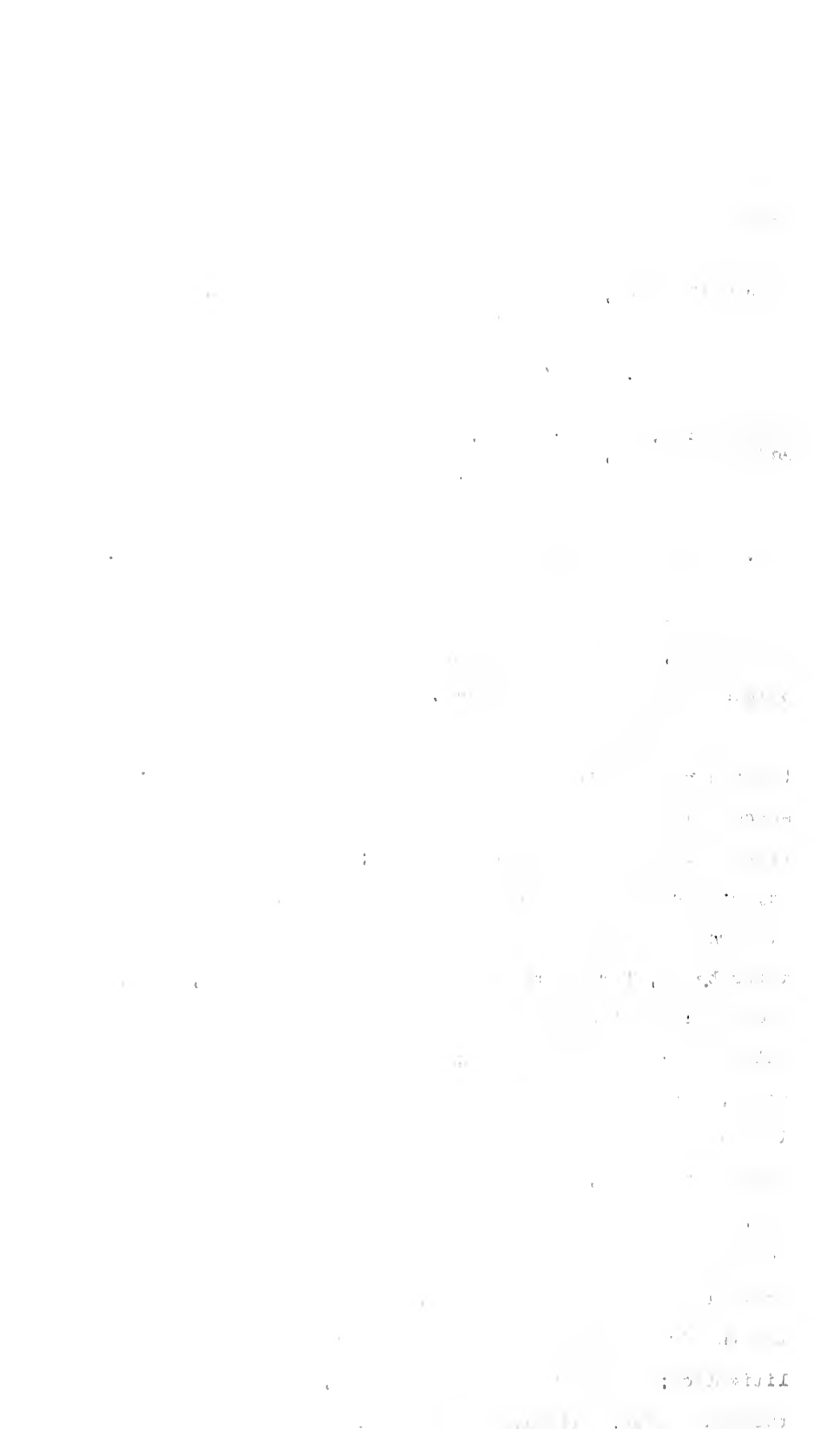
COOK COUNTY.

209 I.A. 628

MR. JUSTICE McDONALD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an injunction order commanding appellants, defendants below, to turn on the water in the premises owned by complainant.

The bill of complaint alleged that complainant is the owner of a certain building in the village of Maywood, the second floor of which he occupies as his residence, and the store below is occupied by a tenant; that the said Village of Maywood possesses an artesian water system, by means of which it furnishes water to the residents of the said village on a meter basis, for a consideration; that on July 7, 1917, neither the complainant nor his said tenant was indebted to the said village for water furnished; that on said date the defendant Meyer, who was then holding the office of water superintendent in said village, and the defendant Sweeney, who was then the village marshall, and the defendant Norton, the village repair man, went to the aforesaid premises and informed complainant that they were going to shut off the said water supply, assigning as a reason therefor, that complainant had failed to testify to suit one of the said defendants, in certain litigation; that the defendant Norton, at the order of the said Meyer, thereupon shut off the water supply to the said premises.



The bill further alleged that defendant Norton was irresponsible and unable to respond in damages; that complainant would lose his said tenant and suffer irreparable loss, injury and inconvenience if the said water supply remained shut off from his said premises at the caprice of the defendants and through the malicious persecution of the "petty village tyrant, Frank Meyer, holding the triple office of water superintendent, water collect, and sewer inspector, usurping the arbitrary autocracy of an imperial czar in all the multiplicity of his official capacities;" that complainant's damages could not be accurately estimated or computed in money and that consequently he had no adequate remedy at law; that unless defendants were restrained from interfering with the water supply, the result would be a multiplicity of suits between the parties, which would result in irreparable injury.

Then followed the prayer that defendants be restrained from interfering with the free delivery of water through the meter to the said building, and from annoying, assaulting or profanely and obscenely abusing the complainant, until the further order of court.

The Village of Maywood was not made a party defendant.

On the presentation of the bill of complaint, an injunction was issued as prayed therein, and in addition thereto, the defendant Frank Meyer was ordered to turn on the water in the said premises forthwith.

Defendant Meyer filed a general and special demurrer to the bill of complaint, and a written motion to dissolve the injunction. Defendants Sweeney and Norton filed sworn answers to the bill and also moved the court to dissolve the said injunction; all of which said motions were supported by

affidavits. Upon a hearing thereon, the said motions to dissolve the injunction were denied, and from this order of denial defendants have appealed.

The defendants were described in the bill as officers of the said village and as such were charged with having acted arbitrarily in shutting off the water supply to the premises in question. Nevertheless, they were made parties defendant in their individual capacities. And it is clear from the allegations of the bill, that the Village of Maywood had an interest in the subject matter of this suit and hence was also a necessary party defendant.

An examination of the bill of complaint discloses that it is barren of essential averments of facts to warrant the interposition of a court of equity.

For the reasons assigned, the decree will be reversed and the cause remanded with directions to sustain the demurrer and dissolve the injunction.

REVERSED AND REMANDED WITH DIRECTIONS.

2707
466 - 22900

THE HARRIS AUTOMATIC PRESS
COMPANY, a corporation,

Appellee,

vs.

CREAM OF WHEAT COMPANY, a
corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

209 I.A. 529

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the Cream of Wheat Company, defendant below, from a judgment entered in favor of the Harris Automatic Press Company upon the verdict of a jury for the sum of \$2213.28. The claim was for the use of one of appellee's printing presses under the terms of a written contract.

On December 2, 1910, appellant wrote appellee:

" * * * * My proposition is as follows, - You may leave this press here for six months, you to insure it and the title to same to remain yours, we to be under no liability for the press if same is destroyed by fire, strikes or for any other cause not due to our own negligence.

"As soon as your expert is ready to turn over the press to us we will accept it on those terms and put it to work on our labels; we to have the option of either rejecting or accepting and paying for this press at any time within the six months mentioned.

"In default of our accepting in writing the press either on or before six months from the date when same is turned over, it is understood that it is rejected automatically.

"In case the press is rejected, we will pay you \$1.40 per thousand for all perfect labels which it turns out, the understanding being that the press shall make in as nearly as possible a continuous run upon our labels. You to be charged against this \$1.40 per thousand for all expenses attending the running of the press including such excess wastage, if any, that there shall be over 1½ per cent. * * * *"

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On December 5, 1910, appellee replied:

" * * * * While the conditions that you request covering a further trial of the press are pretty severe, to be entirely frank with you we think that if the conditions were reversed that we would ask just about what you ask of us. We have concluded to accept the conditions, as stated in yours of 2nd, for we know to a certainty that that little press can be made to do your work in a manner that will prove eminently satisfactory to you. * * "

The press was repaired and put at work under the terms of this agreement on December 7, 1910.

On April 28, 1911, appellant wrote appellee that the press did not work satisfactorily and said, "We will advise you, however, immediately this run is finished and would ask that you make your arrangements for the removal of the press so that there will be no unnecessary delay after the finishing of this run." This was a rejection of the press, and the letter recognizes a termination of the right to use it under the contract when said run was finished.

On May 3, 1911, appellee replied: " * * * * Our Mr. Huls will be in Minneapolis in the very near future, and promising you in advance that he will not bore you, I hope that you may see proper to give him a short audience. * * * "

Huls called May 11, 1911, and conferred with Mr. Mapes of the Cream of Wheat Company and appellant claims that at this conference a contract was made between the parties whereby appellee was to make and deliver a new press to appellant for the sum of \$6750.00 and as a part of the consideration, appellee agreed to waive, release and cancel all claims for the work done upon the rejected press. The principal witness for appellant on this point is Mapes, whose testimony is somewhat vague and uncertain, while Huls testifies positively (and his testimony as to this particular point is not denied by Mapes) that he told Mapes at ~~the~~ time of the conference that he (Huls) had no

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authority to complete the settlement, but the proposition must be submitted to his company. Huls is corroborated by the contents of a letter written appellee by Mapes for the appellant the same day which begins, -

"Confirming conversation had today with your Mr. Huls with regard to the Harris press now in our possession will say this press having proven unsatisfactory and we being warranted, under the provisions of our letter of June 10, 1910, to order its removal from our premises as we did in our letter of April 28th, 1911, yet being willing, at your request, to give you another chance to make good, we will make you the following proposition: * * * * *".

The record fails to show that this proposition was accepted, or that the minds of the parties ever met in regard to the same. This defense was, therefore, not established.

However, the statement of claim in this case declared upon the written contract evidenced by the two letters of December 2nd and December 3rd, 1910, and this contract as before stated was rejected under its provisions therefor within six months from December 7th, 1910. The statement was perhaps broad enough to cover sums, if any, due upon a quantum meruit, but no proof thereof was offered.

Nor was evidence offered as to the precise number of labels which were printed upon the press during the time the contract was in force, nor proof of the various items of expense, etc. incurred during that time. While appellant kept and used the press after the termination of the contract, its liability for such use, if any, would be upon a quantum meruit and not on the contract which provided for the terms of use only while the contract was in force.

For the reasons indicated the judgment of the trial court is reversed and the cause remanded.

REVERSED AND REMANDED.

222 - 23188

CHAI NASHELMAN,
Appellee,

vs.

GRAND LODGE PROGRESSIVE
ORDER OF THE WEST, a
corporation,
Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant below from a judgment entered upon the verdict of a jury by the Municipal Court of Chicago.

Plaintiff's claim was for \$500.00 alleged to be due under the terms of an accident insurance policy on account of the loss of her left hand. The loss of the hand and the liability for the injury to it was denied by the defendant.

The evidence showed that plaintiff had accidentally slipped upon the sidewalk and fell upon her left hand sustaining a very severe injury which to the medical fraternity is known as "colles fracture". Testimony was offered by plaintiff to show and by defendant to disprove that this fracture had resulted in a total loss of the usual functions of the hand which it was necessary that plaintiff prove in order to recover. Court of Honor v. Turner, 99 Ill. App. 310; Grand Lodge v. Orrell, 206 Ill. 208. Plaintiff testified to her inability to use the hand after the injury and exhibited it to the jury, but refused to permit an examination of it by defendant's experts. These experts were called by defendant as witnesses and error is urged here in the matter of the rulings of the court upon their evidence.

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One witness, Dr. Aizenstadt, who had examined plaintiff's hand shortly after the accident, described the injury thereto and said that at the time it occurred it would cause a complete loss of the function of the hand. He was then asked how long that condition would exist. Objection being made, the court asked the witness if he could answer it. He replied, "Yes" whereupon the court said, "I don't think you can. I know you can't. So go ahead and answer some other question."

Another expert called by defendant was asked in a hypothetical question what in his opinion would be the result of such a fracture as to the deformity and function of the hand and wrist. After objection and a colloquy with defendant's lawyer as to whether the expert could answer that and other similar questions the court said, "It don't take a lawyer or a wise man to know that he cannot answer it. No man could. * * * I know that he cannot answer it. I don't care what the witness says about it. * * * The only question here is the condition of this woman's hand. We are not talking about any theoretical hand."

At one point attorney for defendant suggested, "This doctor is an expert" to which the court replied "I don't care, so am I." The attorney still insisting on his right to introduce expert testimony upon the question of a colles fracture and the effect of it (a right which we think he had) the court said, "I do not care what the witness says about it * * * *".

We think the defendant by the rulings of the court was prevented from putting before the jury competent and proper evidence tending to sustain its theory of the case, and that the remarks of the court in the presence of the jury were prejudicial to the defendant.

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For the error indicated the judgment will be reversed and the cause remanded.

REVERSED AND REMANDED.

227 - 23193

MARY CALLAHAN et al.,
Appellants,

vs.

JOHN J. HEALY, MRS. JOHN J. HEALY,
JOHN RYAN and GERTRUDE PONFIELD
RYAN,

Appellees.

APPEAL FROM

CIRCUIT COURT,
COOK COUNTY.

209 I.A. 637

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by the complainants below from a decree of the Circuit Court of Cook County which dismissed their bill for want of equity.

Appellants are the wife and minor children of one Husband John Callahan. On May 20th, 1913, they obtained a judgment in the Circuit Court of Cook County upon the verdict of a jury against Minnie Schroeder and Frank Hallinan jointly for the sum of \$5000 in a suit brought under section 9 of the Dram Shop Act.

The bill dismissed by the decree here appealed from was brought under the provisions of section 10 of the same act, for the purpose of subjecting certain premises belonging to appellees, Gertrude Ryan and John J. Healy to the lien of the judgment obtained against Schroeder and Hallinan.

The court heard all the evidence, but upon a consideration thereof being of the opinion that the judgment obtained under section 9 was insufficient to sustain proceedings under section 10, granted a motion of the appellees to strike out all the evidence and thereupon dismissed the bill.

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It was held by the court and is here argued by appellees that the declaration filed in the case at law against Schroeder and Hallinan failed to state a cause of action under section 9 and this is the principal question presented by the record. That declaration alleged that defendants kept dramshops and " * * * said defendants did respectively sell and give intoxicating liquors to one Mustand John Callahan, the husband of plaintiff, Mary Callahan, and the father of the plaintiffs, James Callahan, John Callahan and Mary Callahan, which in whole or in part caused the said Mustand John Callahan to be and become during the time aforesaid, habitually intoxicated, in consequence of which habitual intoxication, said Mustand John Callahan wasted and squandered his money and failed and neglected to support the plaintiffs, thereby injuring them in their means of support, etc. * * * * ".

We think this declaration stated a cause of action under section 9 of the Dramshop Act against the defendants there sued. The language of said section 9 is so plain that it scarcely needs interpretation. Its purpose seems to be to make every person who sells intoxicating liquor responsible for injury proximately caused thereby to other persons, and the only necessary allegations, as we understand it, are, first, that the defendants were either directly or indirectly engaged in the liquor business, second, that the defendants sold or gave intoxicating liquor to some person named, and third, that the plaintiffs have thereby sustained injury in some manner indicated by the statute. Cruse v. Aden, 127 Ill. 231. The declaration contained these allegations. It was sufficient when attacked as here collaterally after judgment.

Section 9 also gives a right of action to the persons injured against the owners, lessees, etc. of the premises used

1. The first part of the report is devoted to a general

description of the object of the study.

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for selling, etc.

It is true as appellees here urge that the declaration in the suit under section 9 did not state a cause of action as against appellees Ryan and Healy who were the owners of the premises, but they were not there sued. The statute expressly makes the liability of the owner and lessee with the sellers "joint and several".

The plaintiffs, therefore, had their election in the suit at law, whether they would sue the persons selling or giving the liquor alone, or whether they would join with them those who permitted their premises to be used for the purpose of selling. They chose to sue the persons selling or giving alone.

Section 10 of the Dramshop Act under which this bill was brought, gives to the persons injured a further and additional remedy against the building or premises used or occupied in making the sale or sales on account of which any judgment may be entered in a suit brought under section 9. Such premises are "held liable for and may be sold to pay any such judgment" and "proceedings may be had to subject the same to the payment of any such judgment * * * *". The provisions of both sections nine and ten have been construed by our Supreme Court. Hall v. Allen, 244 Ill. 456; Garrity v. Eiger, 272 Ill. 127. These decisions are to the effect that unless fraud or collusion is made to appear, the amount of the judgment obtained in a suit against the seller under section 9, may not be contested in a proceeding brought under section 10 for the purpose of subjecting the property used to the satisfaction of the judgment. In such proceeding the complainant must prove and the owner or lessor is allowed to controvert all the facts which it is claimed create the lien.

Whether the premises or building described was rented or leased to be used or occupied in whole or in part for the sale of intoxicating liquor; whether defendants knowingly permitted the same to be so used or occupied, and whether the judgment obtained under section 9 has been recovered against the person or persons occupying the building or premises which it is sought to subject to the lien of the judgment for damages in consequence of the sale of intoxicating liquors upon these premises, are all questions of fact, the affirmative of which the complainants must prove and the negative of which the defendants may, if they can, establish.

Appellees argue that the declaration in the suit at law under section 9 should have alleged the selling or giving of the liquor upon the premises which the bill seeks to subject to the lien of the judgment. We cannot agree that this is so. It would have availed the plaintiffs in that suit nothing to have so alleged, since appellees not being parties thereto, could not be thus precluded from contesting these facts when afterwards sued under section 10.

One of the principal questions to be determined in this proceeding was whether the sales of liquor by reason of which damages were assessed in the suit at law were made upon the premises of appellees, and either party had the right to establish their respective contentions on that issue by any competent evidence, whether oral or written.

We are of the opinion that the original declaration stated a good cause of action under section 9 of the Dramshop Act; that on the evidence submitted complainants were entitled to a lien and that the court erred in striking out

complainants' evidence.

The judgment will therefore be reversed and the cause remanded for proceedings conforming to the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

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6/6/79	G. J. Bell	876	1000
9/18/79	M. Newton	874	2193
2/5/80	L. Beagle	222	0800
8/27/82	S. Petchum	782	0600
11/14	Schwarz		

